The Central Law Journal.

ST. LOUIS, APRIL 1, 1892.

The very unique "Letter to Posterity," written by Chief Justice Bleckley, of Georgia, and printed in the *Green Bag* for February, is a story, typical of the man, of his busy and remarkable life. The struggle from a professional income "amounting to between $35 and $50 per annum," to the Chief Justiceship of Georgia, is told in a style that is irresistible, and is instructive to beginners at the bar. What he has to say on the administration of law will doubtless be echoed by many judges on the bench. He facetiously says that "to administer law it is desirable, though not always necessary, to know it." He considers that "in its effect on the deciding faculty the apprehension of ignorance accounts for as much as ignorance itself. My mind is slow to embrace a firm faith in its supposed knowledge. However ignorant a judge may be, whenever he thoroughly believes he understands the law of his case, he is ready to decide it,—no less ready than if he had the knowledge which he thinks he has. And he will often decide correctly, though the law may be as he supposes, whether he knows it or not. My trouble is to become fully persuaded that I know. I seem not to have found the law out in a readable way. I detect so many mistakes committed by others and convict myself of error so often that most of my conclusions on difficult questions are only provisional. I reconsider, revise, scrutinize, revise the scrutiny and scrutinize the revision. But my faith in the ultimate efficiency of the work is unbounded. The law is too often unknown, but is never unknowable. I finally settle down, painful deliberation ceases, and I doubt no more until I am engaged in writing out the opinion of the court, when I discover perhaps that the thing is all wrong. My colleagues are called again into consultation; we reconsider the case and decide it the other way. Then I am satisfied; for when I know the law is not on one side, it must be on the other."

We doubt not that this is the experience of many careful and conscientious judges. But there are some upon the bench who seldom have a doubt as to what the law is, but with greater frequency declare it wrong.

It has constantly occurred to us, and the same thought has probably been in the minds of practitioners generally, how little the daily press may be depended upon for accurate, or even reasonably accurate, statements of law suits or of legal points. Our attention has recently been drawn to this subject by the ludicrous statements of a reporter for the daily press, who undertook, in connection with the report of an accident involving personal injuries, where a locomotive within the limits of a city ran into a sleigh at an unguarded street crossing, to state the law governing the matter. The reporter took the position, with the gravity of a chief justice who had the decision of the case then in his hands, that if it could be shown that the engineer of the locomotive, as well as the driver of the sleigh, were both negligent, the injured parties could not recover, because the former were fellow-servants.

Again we observe, a correspondent, eager for information, asks the New York *Sun*, whether, by the law of England, a man can marry his widow's sister. And the metropolitan luminary gravely replies that "there is nothing in the statute law of England to prevent him from doing so, but the common law forbids such a marriage."

And we might cite many more glaring instances of the inaccuracy and unreliability of the daily press in the reports of trials and decisions of courts. And we might point the moral: Subscribe for a law newspaper.

A decision of interest, bearing on the validity of trust agreements, has recently been rendered by the Supreme Court of Ohio, in the case of the State v. The Standard Oil Co. The case arose upon *quo warranto* proceedings to oust the company from its corporate rights and to forfeit its franchise, because of certain trust agreements made by it or by its officers or agents. The company set up in answer to the petition, the defense that the trust agreements in question were entered into by individuals, and not by

the company as a corporation holding a franchise, but a demurrer by the attorney-general to this answer was sustained by the court. The judgment against the company does not go to the extent of forfeiting its franchise, but prohibits it from carrying out or fulfilling the trust agreements of which complaint was made.

NOTES OF RECENT DECISIONS.

NATURAL GAS — TRANSPORTATION — REGULATION BY STATES — INTERSTATE COMMERCE.— The case of Benedict v. Columbus Const. Co., 23 Atl. Rep. 485, decided by the Court of Chancery of New Jersey, is of special interest, involving, not only a constitutional question of growing importance, but also the validity of a recent enactment of the State of Indiana, designed to regulate the transportation of natural gas. The act of March 9, 1889, of that State, making it unlawful to conduct natural gas from within to points outside the State, having been declared unconstitutional, the legislature, on March 4, 1891, passed an act to regulate the mode of procuring, transporting and using natural gas, and providing, among other things, that such gas shall not be transported through pipes at a pressure exceeding three hundred pounds per square inch, nor otherwise than by the natural pressure of the gas flowing from the well, and making it unlawful to use a device or artificial appliance for the purpose of increasing the natural flow of wells. In the present suit it became necessary, incidentally, to determine the validity of this act. The court held that the act, under the guise of police regulation, sought, in effect, to restrict interstate commerce, and, therefore, so far as this suit was concerned, would be held invalid. McGill, Chancellor, says:

In view of the hostility exhibited by the gas interests of Indiana to the defendants' scheme, and the unconstitutional act of March 9, 1889, it is not surprising to find in the act of 1891 something more than a mere police regulation. I cannot escape the conviction that the purpose of the provision considered was to prevent the transportation of gas without the territorial limits of Indiana. Such a purpose is unlawful, in that it seeks to impose a burden upon interstate commerce, which directly and substantially interferes with its freedom; for it is admittedly impossible to transport gas, with commercial profit, in any other way than through pipes. Until the national congress interferes by regulating the transportation of natural gas from State to State, it being admittedly a dangerous commodity, the several States may make reasonable regulations for the protection of the life and health of their citizens against it, and such regulations, when not directed against interstate commerce, but only incidentally and necessarily affecting it, will be upheld as valid. Upon this subject, in Railway Co. v. Alabama, 128 U. S. 96, 9 Sup. Ct. Rep. 28, Mr. Justice Field, pronouncing the opinion of the Supreme Court of the United States, said: "It is conceded that the power of congress to regulate interstate commerce is plenary; that, as incident to it, congress may legislate as to the qualifications, duties, and liabilities of employees and others on railway trains engaged in that commerce; and that such legislation will supersede any State action on the subject. But, until such legislation is had it is clearly within the competency of the States to provide against accidents on trains whilst within their limits. Indeed, it is a principle fully recognized by decisions of State and federal courts that, whenever there is any business in which, either from the products created or the instrumentalities used, there is danger to life or property, it is not only within the power of the States, but it is among their plainer duties, to make provisions against accidents likely to follow in such business, so that the dangers attending it may be guarded against as far as practicable. * * * Such legislation is not directed against commerce, and only affects it incidentally, and therefore cannot be called, within the meaning of the constitution, a regulation of commerce. As said in Sherlock v. Alling, 93 U. S. 99, 104, legislation by a State of that character 'relating to the rights, duties, and liabilities of citizens, and not indirectly and remotely affecting the operation of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit.' " But where the State law steps beyond the lawful domain of police regulation, and, under its guise or otherwise, seeks by its legislation to restrict interstate commerce, such legislation becomes invalid.

The Supreme Court of the United States has repeatedly refused to exactly define the line to which the several States, by legislation, may incidentally affect interstate commerce, preferring to pass specially upon the facts of each case as it shall be presented to them. In Hall v. De Cuir, 95 U. S. 485, Chief Justice Waite said: "The line which separates the power of States from this exclusive power of congress is not always distinctly marked, but oftentimes it is not easy to determine on which side a particular case belongs. Judges not infrequently differ in their reasons for a decision in which they concur. Under such circumstances, it would be a useless task to undertake to fix an arbitrary rule by which the line must in all cases be located. It is far better to leave a matter of such delicacy to be settled in each case upon a view of the particular rights involved." And in Smith v. Alabama, 124 U. S. 465, 8 Sup. Ct. Rep. 564, Mr. Justice Matthews said: "There are many cases, however, where the acknowledged powers of the State may be exerted and applied in such a manner as to affect foreign or interstate commerce without being intended to operate as commercial regulation. If their operation and application in such cases regulate such commerce so as to conflict with the regulation of the same subject by congress, either as expressed in positive laws or implied from the absence of legislation, such legislation on the part of the State, to the extent of that conflict, must be regarded as annulled. To draw

the line of interference between the two fields of jurisdiction, and to define and declare the instances of unconstitutional encroachment, is a judicial question often of much difficulty, the solution of which perhaps is not to be found in any single and exact rule of decision. Some general lines of discrimination, however, have been drawn in various and numerous decisions of this court. It has been uniformly held, for example, that the States cannot by legislation place burdens upon commerce with foreign nations or among the several States."

In the case of Sherlock v. Alling, 93 U. S. 99, Mr. Justice Field sums up the character of the laws which had at that time been declared to be invalid in the following language, which was afterwards quoted with approval by Mr. Justice Matthews in Smith v. Alabama, *supra*. He says: "But, upon an examination of the cases in which they were rendered, it will be found that the legislation adjudged invalid imposed a tax upon some instrument or subject of commerce, or exacted a license fee from parties engaged in commercial pursuits, or created an impediment to the free navigation of some public waters, or prescribed conditions in accordance with which commerce in particular articles or between particular articles or between particular places was required to be conducted. In all the cases the legislation condemned operated directly upon commerce, either by the way of tax upon its business, license upon its pursuit in particular channels, or condition for carrying it on. Thus, in the Passenger Cases, 7 How. 445, the laws of New York and Massachusetts exacted a tax from the captains of vessels bringing passengers from foreign ports for every passenger landed. In Pennsylvania v. Bridge Co., 13 How. 518, the statute of Virginia authorized the erection of a bridge, which was held to obstruct the free navigation of the River Ohio. In the case of Sinnot v. Davenport, 22 How. 227, the State of Alabama required the owner of a steamer navigating the waters of the State to file, before the boat left the port of Mobile, in the office or the probate judge of Mobile county, a statement in writing, setting forth the names of the vessel and the owner or owners, and his or their place of residence and interest in the vessel, and prescribed penalties for neglecting the requirement. It thus imposed conditions for carrying on the coasting trade in the waters of the State in addition to those prescribed by congress. And in all the other cases where legislation of a State has been held to be null for interfering with the commercial power of congress, as in Brown v. Maryland, 12 Wheat. 425; State Tonnage Tax Cases, 12 Wall. 204; and Welton v. Missouri, 91 U. S. 275,—the legislation created in the way of tax, license, or condition a direct burden upon commerce, or in some way directly interfered with its freedom." To the cases cited in this quotation may be added Telegraph Co. v. Pendleton, 122 U. S. 347, 7 Sup. Ct. Rep. 1126, in which the Indiana statute attempted to regulate how telegrams sent in Indiana should be delivered in other States; and the case of Railroad Co. v. Husen, 95 U. S. 465, in which a law in Missouri declared that no Texas, Mexican, or Indian cattle should be driven or otherwise conveyed into Missouri between May 1st and November 1st, unless carried through the State in cars without being unloaded, in which Mr. Justice Strong said: "It seems hardly necessary to argue at length that, unless the statute can be justified as a legitimate exercise of the police power of the State, it is a usurpation of the power vested exclusively in congress. It is a plain regulation of interstate commerce, a regulation extending to prohibition. Whatever may be the power of a State over commerce, it is completely internal; it can no more prohibit or regulate that which is interstate than it can that which is with foreign nations. In short, it may be laid down as the single doctrine of this court, and this day, that a State can no more regulate or impede commerce among the several States than it can regulate and impede commerce with foreign nations."

These cases and quotations will serve to illustrate the course and inclination of decision in the United States Supreme Court. I think that they very satisfactorily exhibit that the provision of the statute of Indiana of March 4, 1891, which I now consider, is objectionable to the freedom of interstate commerce, and that the United States Supreme Court will ultimately so decide. Whether its invalidity will affect th whole act or not is not a matter of concern upon thi inquiry. The demonstrated invalidity of the portion considered is sufficient to exhibit that the project of the defendants is capable of lawful execution in a manner which will result in commercially profitable business. If all the provisions of the act are so interwoven as to be incapable of distinct separation, or are of such character that it cannot be said that the legislature intended that the valid parts shall be enforced if the other parts fail, the entire law will be held to be invalid. State v. Kelsey, 44 N. J. Law, 1; Van Cleef v. Commissioners, 38 N. J. Law, 320; Morris v. Carter, 46 N. J. Law, 260; Warren v. Mayor, etc., of Charlestown, 2 Gray, 84, 97; Com. v. Hitchings, 5 Gray, 482; Cooley, Const. Lim. 211, (*177); U. S. v. Harris, 106 U. S. 629, 1 Sup. Ct. Rep. 601; Poindexter v. Greenhow, 114 U. S. 285, 5 Sup. Ct. Rep. 903, 962.

OFFICERS—LIVE STOCK COMMISSIONERS—KILLING DISEASED ANIMALS—DAMAGES.—The case of Pearson v. Zehr, decided by the Supreme court of Illinois, should be read in connection with the Massachusetts case of Miller v. Horton, reported in full and annotated in 32 Cent. L. J. 246. In the latter case it was held in effect that officers of boards of health are responsible in damages for the killing under the provision of statute, of animals claimed to be diseased where such animals are not in fact diseased. In the Illinois case above noted it is held, following and citing approvingly the Massachusetts case, that it is no defense to an action against the members of the board of live stock commissioners for killing the plaintiff's horses that the defendants, as such board, caused an examination to be made, and upon such examination decided that said horses were diseased, and therefore had them killed, since the board's statutory "power to order the slaughter of diseased animals" does not protect them from liability for killing animals, except where it is shown that the animals are in fact diseased. Baker, J. says:

The duties which are to be performed by the board of live-stock commissioners, in cases where they find a dangerously contagious or infectious malady among

domestic animals, are pointed out in section 2 of the act approved June 27, 1885, entitled "An act to revise the law in relation to the suppression and prevention of the spread of contagious and infectious diseases among domestic animals." Laws 1885, p. 1. It is to be noted that the only authority given them by the statute to kill and to destroy domestic animals exists in cases of contagious and infectious diseases, and is the "power to order the slaughter of diseased animals," and the power "to order the appraisement and slaughter of all such animals as have been exposed to such contagion." The statute does not afford, and does not purport to afford, immunity to the commissioners or to their agents and servants in the event they slay live-stock which have been negligently or erroneously determined by the board to be sick with a contagious or infectious malady, or to have been exposed to such contagion. It is the fact of such disease or exposure thereto which, under the statute, gives the power; and without the fact exists, the slaughter of the animals is not an act done under authority of law. In the case at bar it is no justification of that which was done that the commissioners acted in good faith; that there were reasonable grounds for the belief that some of the horses were diseased with glanders, and that others of them had been exposed to that contagion; and that they made or caused to be made, an honest and careful investigation and examination to the best of their ability, and as a result thereof decided and determined that some of said horses were so diseased, and that others of them had been so exposed. It is to be borne in mind that the act of 1885 makes no provision for compensation for animals killed by mistake, and which are not diseased with a contagious or infectious disease, or for paying the value of animals slaughtered upon an erroneous supposition that they had been exposed to such disease; and also makes no provision for a suit or proceeding wherein, after proper notice to the owner of domestic animals supposed to be stricken with a contagious or infectious malady, and an opportunity afforded him to be heard and to introduce his witnesses, there can be a judicial ascertainment of the fact of the existence or non-existence of such disease, or of exposure thereto, and that there is no pretense here of any such ascertainment of the fact or facts. To permit the commissioners to determine *ex parte* that some of the horses had the glanders, and that the others had been exposed thereto, and to hold that determination a justification for slaughtering the horses, without imposing upon appellants the burden of establishing affirmatively the actual existence of such disease and such exposure, would not be a valid exercise of the police power of the State, but would be a palpable violation of the constitutional provision that no person shall be deprived of property without due process of the law. In the late case of Miller v. Horton, 152 Mass. 540, 26 N. E. Rep. 100, it was held by the Supreme Judicial Court of Massachusetts that under a statute of that State providing that, "in all cases of farcy or glanders, the commissioners, having condemned the animal infected therewith, shall cause such animal to be killed without appraisement," the order of the commissioners affords no defense to an action by the owner for compensation against those who executed it, unless the animal killed is in fact infected with farcy or glanders.

LIMITATIONS OF ACTIONS—PERSONAL INJURIES—CONFLICT OF LAWS.—The case of Morgan v. Metropolitan Railway Co., decided by the Kansas City Court of Appeals, having given rise to some discussion, as will appear from correspondence in this issue, it may be well to notice it at length. The action was for personal injury, caused by the negligence of defendant operating a street car line in Kansas City, Mo., and Kansas City, Kan. Plaintiff, a citizen of Missouri, was injured in Kansas, but did not sue in that State, but more than two years after the cause of action arose, brought suit in Missouri. The Kansas statute barred recovery after two years. The court held, inasmuch as by the decisions of the Kansas courts, the statute of limitations is one of repose and not of extinguishment, the *lex fori*, the limitation statutes of the State of Missouri. and not the *lex loci contractus*, the limitation statutes of Kansas, must govern. The court said:

The statutes of Kansas duly pleaded provide: "Sec. 18. Civil actions other than for the recovery of real property can only be brought within the following periods after the cause of action has accrued, and not afterwards, * * * within two years * * * an action for injury to the rights of another."

"Sec. 25. When a right of action is barred by the provisions of any statute it shall be unavailable, either as cause of action or ground of defense."

The contention of defendant is that the laws of Kansas, instead of merely barring the recovery, absolutely extinguished the cause of action within two years, and since this suit was not instituted till more than two years after the cause of action accrued, plaintiff was not entitled to recover. It is now the well-settled law of this State that the statute of limitations of the State in which suit is brought may be pleaded to bar a recovery on a contract made outside of its territorial jurisdiction, and that the statute of the State where the contract was made cannot be pleaded. But it is equally well settled that where the statute of limitations in force when the contract was made operates to extinguish the contract itself, the case no longer falls within the law in respect to the limitation of the remedy, and where such a contract is sued upon in another State the *lex loci contractus* and not the *lex fori* is to govern. Baker v. Stonebraker, 36 Mo. 349; Carson v. Hunter, 46 Mo. 467; McMerty v. Morrison, 62 Mo. 140; Lyman v. Campbell, 34 Mo. App. 213. And this doctrine is alike applicable whether the action be *ex delicto* or *ex contractu*. Upon no ground of principle is there any distinction discernible. Nonce v. Railway, 33 Fed. Rep. 429. This brings us to the consideration of the decisive question in the case: Did the statute of Kansas *lex loci contractus* extinguish the plaintiff's cause of action, or did it merely deny the remedy after the two years' period of limitation? Involved in the determination of this question is the construction of the statute of Kansas which we have already quoted. We must seek for its proper construction in the adjudicated cases in the courts of that State. Courts have uniformly taken notice of the construction given to foreign statutes by the foreign tribunals, and to enable them to do this they have always been in the habit of looking to the reports of such tribunals. McDeed v. McDeed, 67 Ill. 545;

Kimpley v. Kingsley, 20 Ill. 202; McMurray v. Morrison, 62 Mo. *supra*. Turning, then, to the reports of the Supreme Court of Kansas, it has been repeatedly decided that the statute of limitation of that State is one of repose and not one of extinguishment or of conclusive presumption of payment. Elder v. Dyer, 62 Kan. 604; Keith v. Keith, 62 Kan. 40; Pracht v. McNee, 40 Kan. 1; Freeman v. Hill, 45 Kan. 435. In the first of the cases cited it is held that: "In this State (Kansas) all statutes of limitation are considered as operating only as statutes of repose, and not as presumptions of payment." It is true that in the case of Firmill v. Railway, reported in 33 Fed. Rep. 427, it was remarked by the learned judge who tried the case that the Kansas statute of limitation was, in his judgment, intended to extinguish a cause of action after the lapse of the statutory period, and not merely to bar the remedy; but it is to be observed that the attention of the judge was not called to the Kansas adjudications, to which reference has been made by us, for if it had been it is but fair to presume that he would have followed these adjudications. But, however this may be, we feel in duty bound to adopt the following rulings of the Supreme Court of Kansas in the construction of the meaning and purpose of the statutes of limitation of that State in the determination of the question we are considering. This being so, it follows that the *lex fori*, the limitation statutes of the State of Missouri, and not the *lex loci contractus*, the limitation statutes of Kansas, must govern the remedy in this case."

If the statute of Kansas prescribe a five-year period of limitation, and the Missouri statute prescribed a two years' instead of a five years' period, that the latter could be invoked in this case in bar of the plaintiff's cause of action. The limitation laws of Kansas have nothing whatever to do with this case, and therefore we can find no fault with the action of the trial court in so ruling.

MASTER AND SERVANT—TORTS OF SERVANT —SCOPE OF AUTHORITY.—In Mulligan v. New York & R. B. Ry. Co. 29 N. E. Rep. 952, decided by the Court of Appeals of New York, defendant's ticket agent, acting under a notice given him by police officials to look out for a five-dollar counterfeit, and describing three men passing the same, supposing a bill presented at his window by plaintiff in payment for tickets to be one of the counterfeits, and supposing plaintiff and his companion to be the persons described, after giving plaintiff his tickets and change, sent for a police officer, and directed their arrest, while they were seated on the station platform waiting to take the next train. The officer stated that he knew the two men as reputable men, and that there must have been a mistake, but the agent insisted upon their arrest for passing counterfeit money, and they were arrested, but were, after an hour, discharged, the bill passed being pronounced genuine. It was held that the agent was acting without the line of his duty in taking the bill which he supposed to be counterfeit, and causing the arrest; and, it not appearing that plaintiff was at the time of his arrest in the agent's custody, or under his protection, with respect to the execution of the contract of transportation, defendant could not be made liable for his conduct. Earl and Finch, JJ., dissented from the conclusion of the court in a vigorous opinion.

SEALS.

I. *Definition.* — A seal is an impression made upon some yielding substance with the intention of making the authentic mark of a person's assent to the writing to which it is attached or annexed. The term seal is also applied to the mechanical devise used in making the impression, but in this connection it will only be used to denote the impression.[1]

II. *Ancient Usage.*—Seals were known and used among the earliest nations of antiquity. They were early used by the Romans in sealing letters and wills and by the ancient Jews and Persians on all writings of importance, many and remarkable instances of which are to be found in their written records and sacred books. A striking illustration is that of Jeremiah buying the field in Anathoth where he "subscribed the evidence and sealed it, and took witnesses," much in the same way a conveyance of land is now made.[2] Writings under seal were then of great importance, for instance in the Book of Esther X, 10 we read, "Write you for the Jews also as it liketh you, in the King's name and seal with the King's ring, for the writing that is written in the King's name and sealed with the King's seal may no man reverse." And now the importance attached to seals in the Oriental nations is very great. Without one, no document is regarded as authentic.[3] During the mediæval period they were also regarded of great consideration, and were essential proofs of authenticity of all sorts of documents, both private and public. In civil law, seals were evidence of truth and were required of every witness of an attestation of a testament. No seal was

[1] Bouv. Law Dictionary, Abbott's Law Dictionary, 1 Am. Law Review, 638.
[2] Jeremiah XXXII, 10.
[3] Smith's Bible Dictionary; Ency. Britanica.

requisite under the civil law, in a conveyance of property. Any instrument containing a description of the property, the names of the parties, the consideration, and the date of the transfer was sufficient to pass title, and by the Mexican law and writing together with livery of seizen or delivery of possession, is enough to convey land.[4]

III. *Origin of the Common Law Seal.*—Such of the early Saxons as could write, signed their names instead of using seals, and those who could not write made a cross, (their mark.)

The Normans at their first settlement in France used seals for the same reason that the illiterate Saxons, made the cross—because of their inability to write—and the custom continued after the reason for it had ceased. The Normans, at the time of the conquest, carried this custom of using the seals into England, and gradually substituted it for that of the Saxons and thus it was under the Norman monarchs that sealing became a legal formality in England. The first Charter in England, witnessed only by a seal, is that of Edward, the confessor, a Norman by education, to Westminster Abbey. The custom of using seals only, in witnessing a writing remained in England until statute 29 Car. II when signing as well as sealing became essential. At first the seal was generally appended to the document by a tape running through the resinous substance upon which the impression was made, but later the wax was spread upon the paper.[5]

It was indispensable at common law, at least after the time of Edward III, to a valid deed that it should be sealed; and this rule obtained, originally very generally throughout the United States.[6] Until statute 29 Car. II signing was unnecessary in the common law execution of a deed,[7] and such common law conveyance has been held good in Kentucky and very likely would be so held in Florida, North Carolina, and Tennessee, whose statutes seem to recognize a common law execution of a deed sufficient to convey land.[8]

[4] Ency. Brit.; 1 Am. Law Rev. 638; Stanley v. Green, 12 Cal. 166.

[5] 2 Black. Com. 305-6; Ency. Brit.; Cham. Ency.

[6] 3 Washb. R. 286.

[7] 2 Black. Com. 309; 1 Woods' Com. 192.

[8] Plummer v. Russel, 2 Bibb. 174; 3 Washb. R. P. 286.

IV. *Common Law Definition.*—The common law definition of a seal as given by Chancellor Kent in Warren v. Lynch,[9] is an impression upon wax, wafer, or other tenacious substance, and impliedly, though he did not expressly so state, the Chancellor said, "any impression, not on wax, wafer or other tenacious substance is not a seal." Upon this proposition however, the weight of authority seemed to agree that "an impression alone, without any wax, wafer, paste, gluten, gum, mucilage is a good legal and sufficient seal, though the rule is otherwise in Massachusetts and New York, where it is held that an impression on paper alone is insufficient unless expressly made so by statute.[10] Chancellor Kent maintains that the object of seals is to give due solemnity and ceremony in the execution of important instruments and not to designate any particular person; and President Pendleton said, in Jones v. Longwood,[11] "To consider the thing upon the reason of it, a seal is required to give solemnity to the act. Though no other reason can now exist, apparently the custom arose as Blackstone says, because of the 'insurmountable' reason—ignorance."[12]

V. *The Use of the Scroll.*—The general rule, then, being that, an impression simply used as such was a good and sufficient seal, the next thing the courts had to consider was, "is it safe to go farther and use a scroll in place of an impression or seal?" Chancellor Kent claimed that "a scrowl (scroll) has no property of a seal. To adopt it as such would be, at once, to abolish the immemorial distinction between writings sealed and writings unsealed," while on the other hand President Pendleton could "perceive no distinction in point of solemnity between the act of impressing wax, and of making a scroll." He says, "What is the private seal of an individual? Does an impression form any criterion by which to decide whether it be his seal or not? It is true that some few gentlemen have seals which impress their family coat of arms, and some such as impress their initials, but these are rare indeed when compared with the great body of the community who have no seals, and who use such as is placed

[9] 5 Johns. 239.

[10] 1 Am. Law Review, 638.

[11] 1 Wash. (Va.) 42.

[12] Warren v. Lynch, 5 Johns. 239; 2 Blackstone Com. 305-6.

on the writing for them. In truth and reality it is unimportant whether this adoption be of wax or a scroll. Scrolls have long been substituted in this country for seals. The party acknowledges the scroll to be his seal and such this court will consider it."[13] Following the reasoning of President Pendleton scrolls have been substituted for seals by statute in several of the States;[14] and in others private seals have been abolished;[15] and in nearly all of the States, statutory provisions govern. It Massachusetts it has been held that a mere *fac simile* of a seal of a corporation printed with red ink on a blank form of an obligation at the same time the blank was printed, and by the same agency, is no more than a scroll and is not a seal.[16] But this case was decided as the courts say upon the common law idea of a seal as defined by Chancellor Kent, and in Maine the court held that an imprint in red ink of what purports to be the corporate seal recognized as being such by the language opposite adopted and declared upon by the company as being their seal was a good and sufficient seal.

VI. *Of Contracts under Seal.*—A different rule of law applies to contracts under seal, as to consideration, than to unsealed contracts. A deed or other contract under seal is valid without a seal,[17] not as an exception to the general rule that every contract must be supported by a consideration, but because the law implies a consideration, the consideration is conclusively presumed from the nature of the contract.[18] It was said by Baldwin, J.,[18a] that the difference between instruments sealed and unsealed is, at least at this day, a mere arbitrary and unmeaning distinction made by technical law unsustained by reason, and though the courts may have no right to abrogate what the law has established, yet they will not go out of their way to give effect to such distinctions, when the law does not clearly so require. The reasons for private seals clearly no longer exist. It is said that they give greater formality and solemnity to the instrument, but this is no longer true since the scrivener affixes the seal or makes the scroll with the flourish of the pen. Sealing, instead of being a relic of "ancient wisdom," as claimed by the court in Jackson v. Wood,[19] would rather seem to be a relic of ancient ignorance and barbarism. The "private" seal is nothing more than a naked, useless, absurd formality, meaning nothing, proving nothing; while at the same time the most important legal consequences are suffered to depend upon it.[20]

VII. *Deeds.*—A deed cannot bind a party sealing it unless it contains words expressive of an intent to bind, and if a wife merely signs and seals a deed with her husband, but is not otherwise mentioned in the deed, and there are no words of grant and release as from her, the deed has no operation as against her.[21] One seal will serve for two or more grantors,[22] and it is sufficient if the grantor acknowledge his hand and seal before the subscribing witnesses who do not see the grantor sign.[23]. It is immaterial who affixes a seal to a deed; if the grantor signs it and delivers it he thereby adopts the seal,[24] and a deed not signed or sealed by all of several grantors will be good as against those who do sign and seal.[25] But if it is signed by all, and declares within the deed that the grantors affix their seals, and there are not as many seals as signers, some of the signers will be presumed to have adopted the seals of some of the others, unless the party, at the time of the signing of the instrument, does some act showing his intention not to be bound like the others.[26] Unless a statute providing for the execution of a deed by a public officer directs it to be sealed with his official seal, it should be sealed with his private seal.[27] Equity will not interfere to compel the affixing of a seal to a voluntary conveyance which is invalid for want of a seal.[28]

[13] Warren v. Lynch, 5 Johns. 329, and Jones v. Logwood, 1 Wash. (Va.) 42.

[14] Arkansas, Delaware, Georgia, Minnesota, Missouri, North Carolina, Oregon, Pennsylvania, South Carolina, Virginia and Wisconsin.

[15] Ohio, Tennessee, Iowa, Michigan, Texas, Kentucky, Kansas, Indiana, Mississippi and Nebraska.

[16] Bates v. B. & N. Y. Cent. R. R. Co., 10 Allen, 251.

[17] Craft v. Bunster, 9 Wis. 508.

[18] 1 Parson on Contracts, 428.

[18a] 13 Cal. 33.

[19] 12 Johns. 73.

[20] 6 Albany L. J. 345. And see Ayeres v. Harness, 1 Ohio, 368.

[21] Lufkin v. Curtis, 13 Mass. 223.

[22] McKay v. Bloodgood, 5 Cush. 359.

[23] 1 Esp. 97.

[24] Elwell v. Shaw, 68 Mass. 42-47.

[25] Coulton v. Seavey, 22 Cal. 501.

[26] Yale v. Flanders, 4 Wis. 96.

[27] Eaton v. North, 20 Wis. 449.

[28] Eaton v. Eaton, 15 Wis. 259.

VIII. *Corporate Seals.*—Among the attributes of a corporation, Kidd enumerates, "To have a common seal;" and Blackstone adds, "A corporation being an invisible body, cannot manifest its intention by any personal act or oral discourse. It therefore acts and speaks only by its common seal." This doctrine, never without its exceptions, is now practically obsolete.[29] In England, as the art of writing came into general use, the sealing of written instruments grew into disuse, except for a few of a particularly high and important character, such as were used in the conveyance of land, but the practice continued with the old corporations, and the rule grew up that excepting in the administration of their internal affairs, corporations aggregate could signify their assent only by their corporate seal; and this being the rule, it became incident to every corporation to have a corporate seal; hence it is held that a corporation may adopt and use any seal it chooses.[30] To bind a corporation by deed it must be sealed by its original corporate seal or its seal by adoption, for a deed sealed with the private seal of the agent will not bind the corporation as a deed.[31] In most of the States which have abolished private seals, corporations are still required to use their corporate seal the same as before such abolition; so, too, where a scroll has been substituted for a seal, corporations do not fall within the rule.[32] It has been held that another seal than the corporate one is valid when used with the consent of the board of directors of the corporation.[33] The course of modern decisions is that while corporations may make all their contracts by deed, they are no more obliged to do so than are natural persons.[34] Affixing the corporate seal to an instrument does not make it a corporate act unless affixed by a duly authorized agent.[35] The effect of affixing a corporate seal to an instrument is the same as when an individual affixes his—it becomes a specialty.[36] If the common seal of a corporation be affixed to an instrument, and the signatures of the proper officers be proven, courts will presume the officers did not exceed their authority;[37] and affixing the common seal of a corporation with such intent perfects it, and it becomes the deed of the corporation immediately. So, it is held that an agent appointed by vote or parol may make and bind the corporation by an instrument under seal.[38]

IX. *Other Seals.*—Most public officers and courts of justice have official seals, the use of which is regulated almost entirely by statute. The seal of a notary public is taken judicial notice of by the courts, he being an officer recognized by the whole commercial world; and so the seals of foreign admiralty and marine courts are judicially recognized and need not be proven.[39] And the seal of a nation is an emblem of sovereignty; hence every sovereign recognizes and public functionaries take notice of the existence of the seals of State of the civilized powers in the world, but the seal of a new power is not permitted to prove itself,[40] and all such seals in New York and Massachusetts must be the common law seals as defined by those courts.

C. H. CROWNHART.

[29] Kidd on Corp. 263; A. & A. on Corp. 281-6.
[30] Angell & Ames on Corp. 199.
[31] Randall v. Van Vetchen, 19 Johns. 65.
[32] Boone on Corp. 42.
[33] 30 Vt. 159.
[34] Bank of Columbia v. Patterson, 7 Cranch, 299; New Athens v. Thomas, 82 Ill. 259.
[35] Damon v. Inhabitants of Granby, 2 Peck. 345.
[36] Clark v. Woolen Manufactory of Boston, 5 Wend. 256.
[37] Reed v. Bradley, 17 Ill. 321.
[38] Bank of Columbia v. Patterson, 7 Cranch, 299.
[39] 2 Greenleaf on Ev. 9.
[40] Coit v. Millikin, 1 Denio, 376; The Estrella, 4 Wheat. 298.

FOREIGN CORPORATIONS — TAXATION—CONSTITUTIONAL LAW.

PEOPLE V. WEMPLE.

Court of Appeals of New York, February 2, 1892.

1. A New Jersey manufacturing corporation, having its principal business office there, but which manufactures and sells a portion of its wares in New York, and has mills, warehouses and large bank deposits in that State, is a foreign corporation "doing business" there within the meaning of Laws N. Y. 1881, ch. 361, and subject to taxation thereunder.

2. A State in the exercise of its sovereign power may exclude foreign corporations altogether from its territory, or admit them subject to conditions, and among others to that of taxation.

3. A tax upon the capital employed by a foreign manufacturing company in making and selling its goods within the State is not invalid as an interference with interstate commerce.

Petition for *certiorari*, upon the relation of the Southern Cotton-Oil Company, to review the action of Edward Wemple, as comptroller of the State of New York, in imposing upon the relator

a tax, under the corporation tax laws of the State. The general term affirmed the decision of the comptroller. Relator appeals. Affirmed.

O'BRIEN, J.: The relator is a corporation organized under the laws of New Jersey, having an authorized capital of $5,000,000, $4,000,000 of which have been issued. On September 2, 1890, the comptroller of this State, in pursuance of chapter 361 of the Laws of 1881, fixed and determined the amount of taxes due from the relator to the State for three years ending November 1, 1889, at $2,303.42; and, in arriving at this result, he found that the amount of its capital stock employed by the relator within this State was $100,000 for the year 1887, $1,333,333 for the year 1888, and $121,212 for the year 1889. No question appears to be made by the relator in regard to the correctness of the comptroller's action in estimating and fixing the amount of its capital in use in this State, or in determining the amount of the tax thereon, if it is liable for any tax at all. The relator's sole contention on this branch of the case is that it is not doing business within the State, and hence is not within the statute. If the relator is within the statute, and the comptroller had jurisdiction to inquire and determine whether the relator was employing any part of its capital in business within this State, and, if so, the amount, we do not understand that the relator complains of the disposition made of the facts bearing on the questions of value. In regard to the facts bearing on the question whether the relator is doing business within this State, the return to the writ of *certiorari* brought to review the action of the comptroller states that it "consisted in part of maintaining a sales agency in the city of New York, and selling the product of its mills in this State, and in refining crude oil within this State, and delivering the same to purchasers therein, and maintaining a depot or warehouse in the State of New York for the storage of its products therein, and in keeping on deposit in the banks in the city of New York large sums of money for the use of the relator, and for the carrying on of its business; that during the year 1887 nearly forty per cent. of the total sales of products by the relator were sales made in the State of New York, and during the year 1888 over thirty-three and one-third per cent. of the total sales of relator's products were made in the State of New York, and during the year 1889 over three per cent. of its total sales were made in the State of New York." It further appears that the relator's business is the manufacture and production of oil from cotton seed, and refining and selling the same. Its principal office is at Camden, N. J., but it has an office or agency in the city of New York. During the year 1888 it kept in banks of this State, for use in the transaction of its business, $15,124; and during the year 1889, $88,773.74. During the three years for which the tax was assessed it sold in this State about one-third of its whole product.

There can be no doubt that a corporation created by the laws of another State, but doing business in this State, is subject to the jurisdiction of the officer whose duty it is, under the act of 1881, to determine and assess the amount of taxes which corporations are bound to pay to the State, and is subject to taxation as well as a domestic corporation. The basis of the tax is the amount or portion of its capital in use here in the transaction of its ordinary business. How much that may be in any particular case is generally a question of fact, to be determined by the comptroller under the procedure pointed out by the statute. There is no injustice or hardship in such a law. If a foreign corporation, or a corporation created by the laws of a sister State, employs the whole or a portion of its capital here, and thus has the benefit and protection of the government and laws of the State to the extent of the capital so employed, there is no reason why it should not be subjected, to the extent of the capital so employed, to the same burdens and obligations as a domestic corporation. The tax is not imposed upon its property, but for the privilege which is extended to it by the State of doing business here as a corporation, and in its corporate name. Since the statute has been amended so as to make the amount of capital used in this State the basis of the tax, the amount of business transacted here is of much less importance than formerly. If but a very small part of the corporate business is done here, and but a small part of the capital employed here, then the tax is correspondingly light.

The facts in this case show that during the years for which the assessment was made the relator employed a portion of its capital and conducted a substantial part of its business operations within this State, and that was enough to subject it to the obligation to defray some part of the public burdens. The statute in question in its application to corporations created by the laws of another State and doing business here has been frequently construed by this court, and the principles applicable to such cases stated. The facts of this case bring it within the rule of liability enunciated in these cases. People v. Trust Co., 96 N. Y. 387; People v. Mining Co., 105 N. Y. 76; 11 N. E. Rep. 155; People v. Wemple, 29 N. E. Rep. 812 (Jan. 1892).

The statute under which the tax in question was imposed is not in conflict with the provisions of the federal constitution, which confers upon congress the exclusive power to regulate commerce between the States. Though the relator is a New Jersey corporation, its principal manufacturing operations are carried on in the southern or cotton producing States. For the purpose of disposing of its product, it is necessary or convenient to establish and keep an agency in the city of New York, and to employ some part of its capital here, though it may be a comparatively small part, and to sell a considerable part of the product of its factories here. All this it does in its corporate name and character. The State has the power to exclude corporations of other States from doing business within its jurisdiction. If, how-

ever, it permits them to come here and transact their business, it may impose a tax upon them for this privilege; and this is not a regulation by the State of interstate commerce, but a lawful exercise of the power of taxation upon corporate bodies that for the time being are within its jurisdiction for that purpose. If the contention of the learned counsel for the relator should prevail, then any manufacturing corporation in other States, or even in a foreign country, could come here,and establish an office or agency, and transact a part or even the whole of its business here, and escape taxation entirely, upon the ground that it was engaged in selling some part of its product in other States or in foreign countries, and therefore was engaged in interstate or foreign commerce, within the meaning of the federal constitution. The commercial clause of the federal constitution does not preclude the States from exercising the power of taxation in such a case as is disclosed by this record. The cases in which statutes enacted by the States have been held invalid as regulations of commerce were stated by Mr. Justice Field in Sherlock v. Alling, 93 U. S. 102, as those legislative acts which "imposed a tax upon some instrument or subject of commerce, or exacted a license fee from parties engaged in commercial pursuits, or created an impediment to the free navigation of some public waters, or prescribed conditions in accordance with which commerce in particular articles or between particular places was required to be conducted." They are all cases which operate directly upon commerce. In another part of the same opinion the learned judge explains the scope and meaning of the provision conferring upon congress exclusive power to regulate commerce. "In conferring upon congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of its citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce, and persons engaged in it, without constituting a regulation of it, within the meaning of the constitution." The only limitation upon the power of a State to exclude a foreign corporation from doing business within its limits, or to exact conditions for such a privilege, arises where the corporation is in the employ of the federal government, or where its business is strictly commerce,—interstate or foreign. Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 12; Mining, etc., Co. v. Pennsylvania, 125 U. S. 181, 190, 8 Sup. Ct. Rep. 737.

The cases are numerous in the highest federal court where legislation such as that now under consideration has been held to be valid, and none of the cases cited by the learned counsel for the relator hold that a State statute imposing a tax upon a manufacturing corporation of another State for the privilege of doing business here is nivalid. State Tax Cases, 15 Wall. 232; State Tax on Gross Receipts, *Id.* 284; Delaware Railroad Tax Case, 18 Wall. 208; Railroad v. Penn, 21 Wall. 492; Philadelphia Fire Ass'n v. People, 119 U. S. 119, 7 Sup. Ct. Rep. 108; Smith v. Alabama, 124 U. S. 482, 8 Sup. Ct. Rep. 564; Insurance Co. v. New York State, 134 U. S. 599, 10 Sup. Ct. Rep. 593; Marye v. Railroad Co., 127 U. S. 123, 8 Sup. Ct. Rep. 1037. The property of a foreign corporation engaged in foreign or interstate commerce may be taxed equally with like property of a domestic corporation engaged in the same business, but a tax or other burden imposed upon the property of either corporation because it is used to carry on that commerce, or upon the transportation of persons or property, or for the navigation of the public waters over which the transportation is made, is invalid and void, as interference with an obstruction of the power of congress in the regulation of commerce. Ferry Co. v. State of Pennsylvania, 114 U. S. 211, 5 Sup. Ct. Rep. 826. The obligation imposed upon the relator by the act of 1881 to pay a tax to the State treasury as a condition of enjoying the privilege of transacting business here does not, in our opinion, conflict with any provision of the federal constitution. The judgment of the general term should be affirmed, with costs. All concur.

NOTE.— What transactions are to be regarded as "doing business" in the State, within the provisions of statutes regulating foreign corporations, is a question of which the books afford many interesting illustrations. The general weight of authority is that occasional and isolated transactions will not render a company subject to such provisions. The purpose of such legislation has been generally held to be the preventing of foreign companies from pursuing and carrying on within the State, the ordinary business for which they were chartered, without complying with the conditions prescribed and subjecting themselves to the regulations established for their government. Such laws are not intended to withdraw absolutely the comity which enables foreign companies to bring suits and make contracts, but only to confine its application to incidental and occasional transactions. Thus, it was held that a contract, by an Ohio corporation made in Colorado, to deliver a steam engine on board the cars in Ohio, was not rendered invalid by the fact that the company had not complied with the statutory conditions for doing business in that State. Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 5 Sup. Ct. Rep. 535. See also Kilgore v. Smith, 122 Pa. St. 48. Nor will the failure to comply with such conditions preclude a foreign company from bringing a suit for the protection of its interests. Utley v. Clark-Gardner L. M. Co., 4 Colo. 369; Fuller & J. Mfg. Co. v. Foster, 30 N. W. Rep. 166. Nor is the soliciting and receiving of subscriptions, through an agent, by a newspaper printed and published in another State, "doing business" within the meaning of the statute. Beard v. Union & Am. P. Co. 71 Ala. 60. Nor the purchase, by a manufacturing corporation, of raw material in another State, either by correspondence or by sending an agent. St. Louis Wire-Mill Co. v. Consol Barb-Wire Co., 32 Fed. Rep. 802. See also Graham v. Hendricks, 22 La. Ann. 523. And where it was provided by statute that the agents of a foreign corporation before entering upon their business as such shall file evidence of authority with the clerks of counties in which they propose to do business (R. S.

Ind. 1881, §§ 3022, 3023), the court held that only such agents as proposed to transact the company's in the State were contemplated and not non-resident managers and agents who come to the State for the purpose of appointing local agents. Morgan v. White, 101 Ind. 413.

But when the transaction is directly in line of the business for which the company was chartered, and is not merely incidental to the protection of its interests, or to its regular business elsewhere, it will be held to be within the meaning of the statute and will subject the company to the provisions of the statute. Thus a foreign corporation engaged in the business of loaning money on mortgages having failed to have at least one known place of business within the State and an authorized agent therein as required by law, the court held that even a single loan and the taking of a mortgage therefor was in violation of the statute, and dismissed a bill in equity for foreclosure. Farrior v. New England Mtg. Secy. Co. 7 South. Rep. 200; Mullens v. Am. F. L. Mtg., 7 South. Rep. 201; Christian v. Am. F. L. & Mtg. Co., 7 South. Rep. 427. And an Utah silver mining company, which shipped its base bullion to Chicago where it was refined and shipped to New York and there refined again into standard bars and sold, and the proceeds deposited and some portion of it loaned out and the balance paid out for the company's purposes in that city, was held to be liable to taxation as doing business within the State. People v. Horn Silver M. Co., 105 N. Y. 76. See People v. Equitable Turst Co., 96 N. Y. 387.

A State may exclude foreign corporations altogether from its limits and may admit them upon such conditions as it sees fit. Its power therefore to impose taxes upon them is broad and general. Ducat v. Chicago, 48 Ill. 172; affirmed 10 Wall. 410; West. Un. Tel. Co. v. Lieb, 76 Ill. 172; Paul v. Virginia, 8 Wall. 168; Leavenworth v. Booth, 15 Kan. 627; Fire Department v. Helfenstein, 16 Wis. 136; Com. v. Milton, 12 B. Mon. 212; Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566; Phoenix Ins. Co. v. Com., 5 Bush, 68, 96 Am. Dec. 331; State Treasurer v. Auditor General, 46 Mich. 224. Such tax may be either a gross sum in the nature of a license fee for the privilege of doing business within the State (State v. Lathrop, 10 La. Ann. 398; State v. Fosdick, 21 La. Ann. 434; Leavenworth v. Booth, 15 Kans. 627; Slaughter v. Com., 13 Gratt. 767), or it may be a percentage of the business done (People v. Thurber, 13 Ill. 554; Fire Department v. Helfenstein, 16 Wis. 137; Com. v. Milton, 12 B. Mon. 212; West. Union Tel. Co. v. Mayer, 28 Ohio St. 521; Phoenix Ins. Co. v. Com., 5 Bush, 68; Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566), or a percentage upon the par value of its capital stock (Attorney Gen. v. Bay State M. Co., 99 Mass. 148; State v. Sioux City, etc. R. Co., 44 N. W. Rep. 1032, 43 Minn. 17), or upon the value of its property in the State. Blackstone Mfg. Co. v. Inh. of Blackstone, 13 Gray, 478. Nor are such license taxes obnoxious to a constitutional requirement that taxes shall be equal and uniform, because they discriminate in favor of domestic companies. State v. Lathrop, 10 La. Ann. 398; State v. Fosdick, 21 La. Ann. 434; People v. Thurber, 13 Ill. 554; Fire Dept. v. Noble, 3 E. D. Sm. 440; Fire Dept. v. Wright, 3 E. D. Sm. 453; Firemen's Ben. Ass'n v. Lounsbury, 21 Ill. 511, 74 Am. Dec. 115; Fire Dept. v. Helfenstein, 16 Wis. 137; Paul v. Virginia, 8 Wall. 168; Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566.

WM. L. MURFREE, JR.

St. Louis, Mo.

CORRESPONDENCE.

STATUTE OF LIMITATIONS: ARE STATUTES OF EXTINGUISHMENT VALID?—CRITICISM OF DECISION OF KANSAS CITY COURT OF APPEALS.

To the Editor of the Central Law Journal:

In looking over the "abstracts of decisions of the Missouri Court of Appeals," contained in your valuable journal of March 11th, 1892, I find an abstract, viz: that of Morgan v. The Metropolitan Street Railway Co., which I question the correctness of. Even if it be correct as the law of the particular case, it is misleading as a general proposition of law.

The abstract is as follows: "If the statute of limitations of the State in which a cause of action arose is one of extinguishment, the *lex loci* controls the action on such in this State. If the statute of such other State is one of repose only, the *lex fori* applies." The class of actions to which the one belongs is not stated, whether upon contract or for the recovery of property; neither are the sections of the statutes under which the case was decided given, so I have no means of knowing the facts of the particular case. But I do not complain of any of these. My claim is that if the law as stated in that abstract is ever correct, the cases to which it would correctly apply are so rare that to state the law as stated is wrong and more liable to injure than to benefit. It is the unquestioned rule of law, which I do not understand was doubted by the court in that case, that the statutes of limitations of the *lex fori*, and not that of the *lex loci* can be pleaded, unless they are one and the same, except when the statute of *lex fori* gives the right to plead the statute of limitations of the *lex loci*. I assume that the statute of the State of Missouri, in which this action was brought and decided, did not give the defendant the right to plead the statute of limitations of the State where the cause of action arose, as the court says: "If the statute of such other State is one of repose, only the *lex fori* applies." In that case the defendant could not plead the statute of limitations of the *lex loci*, if one there was. What a person who takes for granted in all cases the law as he sees it written would understand from the abstract mentioned, and I have no doubt from the entire decision, and what I complain of is, that in some cases the *statute of limitations* of the *lex loci* may be pleaded with effect when the statute of the *lex fori* is silent on the matter, viz.: in cases where the statute of the *lex loci* attempts to extinguish the cause of action, and not merely deprives the party of the right of action after a reasonable time. The latter only is a statute of limitation—of repose. It attempts and does deprive the party of a remedy, and that only, and not of a right. The needs of society demand such a law; it prevents fraud and the litigation and enforcement of stale claims; it is for the protection of society. Each State prescribes the remedies of its citizens, and of the whole world within its jurisdiction; it can change them or take them away entirely, if in doing so it does not in effect take away a right, and by doing so in no way affects the cause of action; it only affects the right of action in that jurisdiction. *Rights* that are *fundamental* States cannot take away; they are secured by the constitution, and any law that assumes to deprive the citizen of those rights is unconstitutional and void. The right to acquire and own property and to contract, and all rights thereunder, are secured by the constitution. Property cannot be taken away nor contracts effected unless by "due process of law." And again, I assert that statutes that assume to ex-

tinguish rights and not merely remedies are invalid. They may be upheld, and often are, as statutes of limitations, merely depriving parties of a remedy, and rights are not mentioned; but when courts do so they violate an unquestioned rule of law that, so far as a statute assumes to deprive a person of a right secured by the constitution, just so far is it unconstitutional and void. I do not mean at this time to discuss the constitutionality of the various statutes which assume to take the property of one man and give it to another, or those that merely assume to annihilate title, or destroy the validity of contracts; it is only the question of the pleading of statutes of limitations, properly speaking that I do or care to discuss at this time. All that the court should have said is that parties' rights are determined by the *lex loci* and not by the *lex fori*; that the *lex fori* cannot enforce a cause of action that does not exist, and that must be determined by the *lex loci*, the common and *valid* statute law of the place where it is alleged the cause of action arose. Whether the statute that assumed to extinguish the cause of action in this case was a valid one is an important question. The court evidently assumed that it was, and that as the cause of action was by it extinguished no action could be maintained on it in Missouri, or, as they misleadingly put it, "the *statute of limitations* of the State in which the cause of action arose, *being one of extinguishment* and not one merely of repose, it could be pleaded as a defense to the cause of action in the *lex fori*."

E. C. BETTS.

Minneapolis, Minn., March 14th, 1892.

To the Editor of the Central Law Journal:

I wish to say that upon examination I find that my abstract correctly states the principle of law which was applied by the Court of Appeals as a test of the merits of the question involved in Morgan v. Metropolitan St. Ry. Co.

Possibly I should have added thereto, "The Kansas statute of limitations, section 18 and 25, is one of repose." I did not embody this clause in my abstract for the reasons, that the principle by which that question was tested applies to the statutes of any State, and not to Kansas alone; that there is no reference in the decision to the copy of the Kansas statutes in which said sections may be found, and for the reason that the court did not enter into consideration the purpose or effect of that statute, but simply adopted (in the nature of a finding of fact) the interpretation placed upon it by the courts of Kansas. The Supreme Court of Kansas having decided that the statute was one of repose, the only question before the Court of Appeals was: "Did that statute operate as a bar to the plaintiff's cause of action in this State (Missouri)." The court having declared the *well settled law* to be: "That where the statute of limitations in force when the contract was made operates to extinguish the contract itself, the cause no longer falls within the law in respect to the limitation of the remedy, and where such contract is sued upon in another State, the *lex loci contractus*, and not the *lex fori* is to govern:" Held, that "the limitation laws of Kansas have nothing whatever to do with this case," for the reason, of course, that it is a statute of repose.

The abstract is as intelligible as a more lengthy statement would have been, unless, in truth, I had stated the facts of this particular case, and the application thereto made by the court of the principle of law stated in the abstract.

It is my understanding that the purpose of the CENTRAL LAW JOURNAL in its digest column is to publish a concise statement of the important principles of law as announciated by current decisions of the several courts, to the end that the practitioner may take advantage of these hints, and determine, by further search of his own, when need requires, whether the decision in its entirety will be of use to him.

No limitations to the doctrine laid down in the opinion are hinted at by the court, and the law is stated in my abstract as it is in the opinion, and upon that authority I may say it is not "wrong," and may venture to hope that at least one man may be "benefited" by it.

A. F. EVANS.

Kansas City.

[NOTE. See opinion of the court on page 278 of this issue.—EDITOR.]

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ADMINISTRATION — Claims — Limitation. —After a claim against an estate had been presented and rejected by the executrix plaintiff's attorney, deeming the claim not sufficiently formal, again presented it to the executrix's attorney, who simply took the claim and said it would be again rejected, and it was so rejected by the executrix: *Held*, that the statute limiting the time of action on rejected claims, began to run from the first rejection.—*Gillespie v. Wright*, Cal., 28 Pac. Rep. 862.

2. ALIMONY—Liability for Debts of Wife.— Alimony is intended by law for the support and maintenance of the wife and children of the husband, and the payment of the wife's counsel's fees in obtaining a divorce (Code Civil Proc. § 1769), and, in the absence of statutory authority, cannot be subjected to the payment of a debt contracted by the wife prior to the date of the decree directing payment of alimony. — *Romaine v. Chauncey*, N. Y., 29 N. E. Rep. 826.

3. APPEAL—Record—Deed. — Where it does not appear that a county treasurer, party defendant to a suit between rival claimants of land, and against whom an injunction is asked restraining the giving of a deed to defendant on a tax certificate, has any rights or inter-

est in conflict with either party, he is not a necessary party to an appeal by the other defendant. — *Soukup v. Union Inv. Co.*, Iowa, 51 N. W. Rep. 167.

4. APPEAL—Review.—Under Rev. St. 1891, ch. 110, § 42, which provides that in actions tried by the court either party may submit written propositions to be held as law, and except to the acceptance of rejection of such propositions, the submission of a request to the court to hold that certain facts have been proved, and to draw certain conclusions therefrom, does not raise any question of law cognizable on appeal, since it does not present any distinct legal proposition.—*First Nat. Bank of Chicago v. Northwestern Nat. Bank of Chicago*, Ill., 29 N. E. Rep. 884.

5. ATTACHMENT—Grounds.— Under Code Iowa, § 2585, providing that, when a corporation, company, or individual has an office or agency in any county for the transaction of business, any suits connected with such office or agency may be brought in such county, an attachment may be sued out against a partnership in any county where it does business, on the ground that it is about to permanently remove therefrom, though none of the partners reside in such county.—*Ruthven v. Beckwith*, Iowa, 51 N. W. Rep. 152.

6. ATTACHMENT—Priorities.— Where plaintiff, a merchant, sold defendants his stock of goods, but was to retain the title thereto, and the control and supervision thereof, until the purchase price was paid, and the contract of sale was not recorded, and plaintiff subsequently sued out a foreign attachment in equity, his claim will be postponed to other creditors. — *Hash v. Lore*, Va., 14 S. E. Rep. 365.

7. ATTORNEY—Compensation.— Plaintiff, an attorney, was interested with his brother in certain business furnished by defendant. The brother was not a lawyer, and had no interest in plaintiff's legal business: *Held*, that an agreement by the brother that plaintiff should undertake certain litigation for defendant on a contingent fee was unauthorized and void.—*Leavitt v. Chase*, N. Y., 29 N. E. Rep. 831.

8. BANKRUPTCY—Partnership and Individual Debts.—A partnership being unable to pay a note upon which it became liable by a partnership indorsement, its members signed, as individuals, an agreement with the creditor for an extension of time, agreeing to convey to him before the expiration thereof certain lands, which were to be sold, and any excess after payment of the debt turned over to the partners: *Held*, that the agreement merely provided a security for the original partnership debt, and on the subsequent bankruptcy of the firm and its members the debt was provable against the partnership, and not against the individuals.—*Gauss v. Schrader*, U. S. C. C. (Ill.), 48 Fed. Rep. 816.

9. BANKRUPTCY—Powers of Assignee.—The assignee of a bankrupt cannot, either voluntarily or by service of process, become a party to a suit in a State court to enforce a lien against the bankrupt's lands, except by express authority from the bankrupt court, as that court, under the bankruptcy act, has exclusive jurisdiction over the entire estate.—*Price v. Price*, U. S. D. C. (Va.), 48 Fed. Rep. 823.

10. BANKS AND BANKING—Special or General Deposit. —Plaintiff delivered money to a banker, her representative stating to him that she wished to leave it with him until he could invest it. He made out a savings deposit ticket in her representative's presence, and gave her a pass book, containing rules and regulations, showing the opening of an account between herself and the bank; and the transaction was entered in his books as other savings accounts: *Held*, that the deposit was a general and not a specific one. — *Wetherell v. O'Brien*, Ill., 29 N. E. Rep. 904.

11. CARRIERS — Passenger—Baggage—Act of God.— Where, in an action by a passenger for loss of baggage, it is admitted that the baggage was on a train which was destroyed by a flood, and the defendant introduces evidence showing that the flood was of such extraordinary character that it could not be forseen or provided against, and that defendant's servants and agents took such precautions to guard the train as were possible, such evidence not being contradicted, it is proper to direct a verdict for defendant, there being no question for the jury. — *Long v. Pennsylvania R. Co.*, Pa., 23 Atl. Rep. 459.

12. CARRIERS — Passengers — Presumption of Negligence.—In an action against a cable railway company by a passenger for injuries by the collision of a grip-car with another car temporarily stopped upon the same track, the occurrence of the collision is sufficient to raise a presumption of negligence on defendant's part. — *North Chicago St. Ry. Co. v. Cotton*, Ill., 29 N. E. Rep. 899.

13. CARRIERS OF GOODS— Connecting Lines. — Where, in an action against a carrier for damages to goods in transit, plaintiff introduces in evidence a way-bill of a prior connecting road, with the exception of a sentence written in lead pencil, reciting that the goods, when received, were in a badly-damaged condition, it is error to exclude that sentence when subsequently offered by defendant; it not appearing that the sentence was written subsequently to the making of the way-bill.— *Goodman v. Oregon Ry. & Nav. Co.*, Oreg., 28 Pac. Rep. 894.

14. CHINESE MERCHANTS — Re-entry Without Certificate.—The presence of a Chinese merchant, otherwise entitled to be in the United States is not rendered unlawful by the fact that upon his return from a visit to Canada the collector permitted him to land, upon the certificate of private persons and his own personal knowledge, without the vised certificate required by section 6 of the amended exclusion act, since that section also provides that "the collector shall in person decide all questions in dispute with regard to the right of any Chinese passenger to enter the United States, and his decision shall be subject to review by the secretary of the treasury, and not otherwise. — *United States v. Lee Hoy*, U. S. D. C. (Wash.), 48 Fed. Rep. 825.

15. CONSTITUTIONAL LAW — Enactment of Statutes.— Although an enrolled copy of the act of 1885, entitled "An act to futher simplify proceedings in justices' courts," etc., bearing the signature of the presiding officers of the senate and house, and the approval of the governor, was filed in the office of the secretary of State, as the senate journal shows that "the bill failed to pass," not having received, as appears by the record, the requisite vote upon its final passage, it must be held that the bill never became a law.— *Currie v. Southern Pac. Co.*, Oreg., 28 Pac. Rep. 884.

16. CONSTITUTIONAL LAW— Title of Act. —The "act to provide for a board of assessors in cities of the third class," passed May 12, 1890, is a general act, within the meaning of pl. 11, § 7, art. 4, of the constitution. Its title gives sufficient expression of its object, within the requirement of pl. 4, § 7, art. 4, of the constitution.—*In re Assessment for Construction of Sewer in City of Passaic*, N. J., 23 Atl. Rep. 517.

17. CONTRACTS — Consideration — Public Policy. — An agreement to pay a bondsman for becoming surety on a bond given to obtain a license to sell liquor is not against public policy. — *Bing v. Willey*, Pa., 23 Atl. Rep. 440.

18. CONTRACT—Implied Contract.— Where a building contract provides that no extra work shall be paid for, unless a separate estimate in writing shall have been submitted prior thereto, the contractors can recover for extra work furnished under a promise by the owner to pay therefor. — *Davis v. Badders*, Ala., 10 South. Rep. 422.

19. CONTRACT— Rescission. —A party defrauded in a bargain may, on discovering the fraud, do one of two things,—he may rescind, and demand back what he has parted with, or he may affirm the contract and sue for damages. If he elects to rescind, he must do so as soon as circumstances permit after the discovery of the fraud. He cannot speculate on the chances, and wait until he can see whether it will be most to his ad-

vantage to rescind or abide by the contract.—*Norfolk & N. B. Hosiery Co. v. Arnold*, N. J., 23 Atl. Rep. 514.

20. CORPORATIONS — Stockholders. — The judgment creditor of a corporation sued its stockholders to enforce their liability for unpaid subscriptions for stock. During the pendency of the suit, three of the directors, without any notice to the other two directors, privately met and passed a resolution authorizing the president and secretary to assign all its property for the benefit of its creditors; and in pursuance thereof a deed of assignment was executed: *Held*, that the assignment was void. — *Doernbecher v. Columbia City Lumber Co.*, Oreg., 28 Pac. Rep. 899.

21. COURTS—Jurisdiction. — Under Acts 1891, p. 39, § 1, conferring jurisdiction upon the appellate court of Indiana of "all appeals from the circuit, inferior, and criminal courts in all cases for the recovery of money only," etc., the appellate court has no jurisdiction of an appeal in a case where the remedy of an accounting between partners is petitioned for and granted, although the final object of the action is the recovery of money.—*Bennett v. Powell*, Ind., 29 N. E. Rep. 926.

22. CREDITORS' BILL — Jurisdiction.— Under Rev. St. ch. 22, § 49 which provides that whenever an execution is returned unsatisfied, the judgment creditor may file a creditors' bill, the fact that the judgment on which an execution was issued was rendered by a federal court does not deprive the State courts of jurisdiction over a creditors' bill based on such judgment. — *Dilworth v. Curts*, Ill., 29 N. E. Rep. 861.

23. CRIMINAL EVIDENCE.—On a trial for grand larceny, defendant's evidence that he fled the country, on hearing that he was to be prosecuted, because he was poor, and unable to give an appearance bond for so serious a charge, is properly excluded, since it is incompetent for a witness, giving evidence in his own behalf, to testify to his uncommunicated intentions.—*Toliver v. State*, Ala., 10 South. Rep. 428.

24. CRIMINAL LAW—Alibi.—In a criminal case, where the defense is an *alibi*, it is error to charge that an unsuccessful attempt to prove an *alibi* is always a circumstance of "great weight" against the prisoner, since there is no distinction between the consequent weight of an unsuccessful attempt to establish an *alibi* and an unsuccesful attempt to prove any other material fact in defense.—*Allbritton v. State*, Ala., 10 South. Rep. 426.

25. CRIMINAL LAW — Burglary — Intoxication.—On a prosecution for burglary, an instruction that evidence of drunkenness can only be considered for the purpose of determining the degree of the crime is error, since under Pen. Code, § 459, burglary is the entering a building with intent to commit grand or petit larceny, or any felony, and since section 22 declares that, "whenever the actual existence of any purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act."—*People v. Phelan*, Cal., 28 Pac. Rep. 855.

26. CRIMINAL LAW—Cruelty to Animals.—Under Rev. St. § 2101, providing that whoever "cruelly beats or needlessly mutilates or kills any animal" shall be fined, etc., the killing of an animal, to constitute an offense, must be needless.—*Hunt v. State*, Ind., 29 N. E. Rep. 933.

27. CRIMINAL LAW — Larceny—Embezzlement. —Larceny and embezzlement being different offenses, Rev. St. 1889, § 3947, allowing a defendant in an indictment for either of said offenses to be convicted of the other upon proof thereof, is in conflict with the provisions of the bill of rights, § 12, that a felony must be prosecuted by indictment, and section 22, that one accused of crimes shall have the right to demand the nature and cause of the accusation.—*State v. Harmon*, Mo., 18 S. W. Rep. 128.

28. DEDICATION — Acceptance.—Where a land-owner files a map of a number of blocks owned by him, on which one block is marked "Central Park," circulates copies of the map, and states in an advertisement, and announces through an auctioneer, while selling the adjacent blocks, that such a block is reserved for a park, he dedicates the block to the public.—*Archer v. Salinas City*, Cal., 28 Pac. Rep. 839.

29. DEED—Building Restrictions.—Whether or not the erection of a boat house, club house, and other building, used merely for repairing the boats belonging to the club, and occasionally the construction of a new one, violates a restriction in the deed prohibiting the construction on the granted premises of any manufactory, workshop, etc., or "building of any kind to be used for any purpose other than one used for a genteel cottage or dwelling-house," is a question not so clear as to warrant a court of equity in granting a mandatory injunction for the removal of the buildings, but complainants will be remitted to their remedy at law.—*Gatzmer v. German etc., St. Vincent Orphans' Asylum*, Penn., 23 Atl. Rep. 452.

30. DEED — Reformation.—In a complaint seeking to reform a deed so as to make it include certain land, an allegation that it was the mutual understanding and intention of the parties that the land in controversy should be described in and conveyed by the deed is a sufficient averment of an agreement to convey the land, and that the failure to describe it in the deed was due to mutual mistake.—*Seegelken v. Corey*, Cal., 28 Pac. Rep. 849.

31. DRAINAGE DISTRICT — Quo Warranto.—The action of drainage commissioners in attempting to levy assessments in excess of benefits, in taking and appropriating to the uses of the district certain private drains without compensation and in taking lands without making compensation therefor, does not justify an action of *quo warranto* against them, since for such abuses of authority the injured party possesses ample remedies at his own suit.—*People v. Cooper*, Ill., 29 N. E. Rep. 872.

32. EASEMENTS—Right of Way by Implication.—A hallway in a building, extending from north to south, and connecting with stairs leading to the street, was used by the tenants of the second-story rooms in common as the only means of ingress and egress. The owner sold the northerly half of the premises, including the portion of the hall adjacent to the stairs, but made no reservation or agreement as to the use of the passage by the occupants of the southerly portion of the building, and subsequently sold such remaining portion: *Held*, that a right of way over the hallway of the portion first sold, and to the street, existed in favor of the last purchaser, and for the benefit of the premises last conveyed.—*Geible v. Smith*, Penn., 23 Atl. Rep. 437.

33. EQUITABLE ESTATE IN FEE—Alienation.—An equitable estate in fee may be alienated, subject to the existing trusts, if the instrument creating it puts no restraint on the power of alienation.—*Gunn v. Brown*, Md., 23 Atl. Rep. 462.

34. EQUITY — Practice.—In the absence of statutory regulation or an independent practice, this court follows the practice of the court of chancery of England, and the rule of practice of that court is, in such a case, the law of this court.—*Southern Nat. Bank v. Darling*, N. J., 23 Atl. Rep. 475.

35. EQUITY—Verdict.—A verdict of a jury in an equity cause is merely advisory, and not binding on the court; and, where the verdict was not followed in making decree, instructions to the jury will not be considered on appeal.—*Brundage v. Deschler*, Ind., 29 N. E. Rep. 921.

36. ESTOPPEL—Acquiescence.—Where a husband owns land and makes a deed absolute on its face, though intended simply as security for a loan, and his wife pays the debt and takes a warranty deed to the land in her own name, the husband, by permitting his wife to sell the land without objection, is estopped to assert any right to the property.—*Allen v. Cannon*, Utah, 28 Pac. Rep. 868.

37. ESTOPPEL IN PAIS — False Representations. — An

owner of lands who induces his creditor to accept as security a mortgage thereon from a third person, by representing that the third person is the owner, is estopped to claim the lands as against the lien of the mortgage.—*Parlin v. Stone*, U. S. C. C. (Mo.), 48 Fed. Rep. 808.

38. EVIDENCE—Declarations of Principal.—In an action to recover a team of horses owned by plaintiff, but purchased in good faith by defendant from one A, who had possession of the team, defendant alleged that A was the agent of plaintiff to effect a sale, and offered in evidence a statement of plaintiff to a third person that "A wants to sell that team:" *Held*, that such statement, though unknown to defendant at the time of the sale, was admissible in evidence, as it was in effect an admission by the owner of the authority of A to sell the team.—*McDonald v. Freed*, Wash., 28 Pac. Rep. 915.

39. EVIDENCE—Proof of Handwriting.—On an issue as to whether a signature purporting to be that of defendant is genuine or was forged, the court, having only the signature of defendant to the answer in evidence for comparison by experts, refused to admit signatures of defendant on loose scraps of paper which she swore were made by her, one about the time of the alleged forged signature, and the others seven years before such time: *Held*, such evidence being rendered competent by Laws 1880, ch. 36, as amended 1888, ch. 555, its exclusion as incompetent was prejudicial error, the range of comparison being too narrowly limited.—*Mutual Life Ins. Co. of New York v. Suiter*, N. Y., 29 N. E. Rep. 822.

40. EVIDENCE — Similar Transactions. — Evidence of prior fraudulent representations is inadmissible in an action to recover moneys paid upon a real-estate contract, alleged to have been procured by representations of a similar kind.—*McKay v. Russell*, Wash., 28 Pac. Rep. 908.

41. EXECUTION SALE — En Masse—Equitable Relief.—Where land worth $2,000 above all incumbrances, and capable of division into two business lots, is sold *en masse* for $60, in violation of Rev. St. ch. 77, § 12, which declares that land susceptible of division shall be sold in lots, the same will be set aside by a court of equity on application within a reasonable time.—*Lurton v. Rodgers*, Ill., 29 N. E. Rep. 866.

42. EXPERT TESTIMONY—Handwriting—Comparison.—An administrator, who states that he found among the papers of the intestate, after his death, a large number of checks purporting to be those of the intestate, and that he examined them, and from the information thus obtained could say that he was acquainted with the signature, is competent to give an opinion as to whether a certain signature is that of the intestate, although he had never seen him write.—*Tucker v. Kellogg*, Utah, 28 Pac. Rep. 870.

43. FRAUDULENT CONVEYANCES—Husband and Wife.—When, by direction of a wife, the rents of her separate estate are paid to her husband with the understanding that he will invest them for her benefit, this creates a debt sufficient to constitute a valid consideration for a subsequent deed from him to her, as against the claims of other creditors. — *Tarsney v. Turner*, U. S. C. C. (Mich.), 48 Fed. Rep. 818.

44. FRAUDULENT CONVEYANCES — Intent.—Where, in an action to set aside a conveyance as fraudulent, there is a special finding of fact, the fraudulent intent must be found, or the conveyance will not be set aside.—*Sickman v. Wilhelm*, Ind., 29 N. E. Rep. 908.

45. GOOD-WILL—"Carrying on Same Business."—An agreement by defendant, on sale of the stock and good will of a plant for making zinc etchings, that he will not enter into the same line of business in any way or manner whatever, is not violated by engaging in the electrotyping and stereotyping business, and supplying occasional demands for zinc etchings from customers by procuring them from makers not connected with defendant.—*Breck v. Ringler*, N. Y., 29 N. E. Rep. 833.

46. GUARDIAN AND WARD.—A guardian provided for and supported her ward, a grandchild, and expended moneys for the latter's schooling, medical attendance, etc., for over ten years. She failed to account for moneys received by her, belonging to the ward, during her lifetime, but it appeared that the benefits received by the ward during such period, and for which the guardian would have been entitled from the court as an allowance, had she so requested, were in excess of the estate of the ward so received. The guardian had also suitably provided for her grandchild by will: *Held*, that the guardian's estate should not be charged with the moneys so received, belonging to the ward, by reason of the guardian's failure to account.—*In re Lafferty's Estate*, Pa., 23 Atl. Rep. 445.

47. HIGHWAY—Dedication. — Where one dedicated a strip of land in front of his premises to the public as a highway, and expressly excepted it as such in his deed of the land, the grantee cannot assume the ownership of the strip, though it was never actually used as a public highway.—*Southern Pac. R. Co. v. Ferris*, Cal., 28 Pac. Rep. 828.

48. INSURANCE — Mortgage—Subrogation.—An insurance policy provided that the loss, if any, should be payable to the mortgagee; that, as to the mortgagee, the policy should not be invalidated by the act or neglect of the mortgagor; and, that, if the insurance company paid the amount of the insurance to the mortgagee, claiming that, as to the mortgagor, no liability existed, it should, to the extent of such payment, be subrogated to the rights of the mortgagee: *Held*, that the insurance company, on payment to the mortgagee, did not become subrogated to his rights unless it was in fact not liable on the policy as against the mortgagor. —*Traders' Ins. Co. v. Race*, Ill., 29 N. E. Rep. 846.

49. JUDGMENT.—A judgment entered by agreement of an attorney is binding on the party, the employment of the attorney giving him power to agree to such entry.—*Devenbaugh v. Nifer*, Ind., 29 N. E. Rep. 923.

50. JUDGMENT—Collateral Attack.—A decree granting an injunction is not void because no bond was filed therein, and therefore is not subject to collateral attack.—*Lewis v. Rowland*, Ind., 29 N. E. Rep. 922.

51. JUDGMENT—TAX TITLES.—A decree in partition is competent evidence against one not a party thereto to establish a link in the claim of title of a person claiming thereunder.—*Gage v. Goudy*, Ill., 29 N. E. Rep. 896.

52. JUDGMENT—Pleading.—In an action of a judgment of a court of general jurisdiction, the judgment is sufficiently pleaded by an allegation that it was recovered, without setting forth jurisdictional facts; the presumption being that the court acted within the authority conferred upon it by law.—*Weller v. Dickinson*, Cal., 28 Pac. Rep. 854.

53. LANDLORD AND TENANT—Forcible Entry.—The entry by a landlord upon premises occupied by a tenant whose lease has expired, by forcing the outer door of the dwelling and removing household goods therefrom, in the temporary absence of the tenant, no other person being present, not accompanied by any other violence or by circumstances tending to excite terror is not a violation of Hill's Code, § 3509, which provides that, where an entry upon land is given by law, it "shall not be made with force, but only in a peaceable manner."—*Smith v. Reeder*, Oreg., 28 Pac. Rep. 890.

54. LEASE—Assignment.—Two members of a limited partnership, defectively organized, assigned a lease made by them to it to the plaintiff, who sought to charge the partners for rent, individually, because of such defect: *Held* that, as the lessors, being members at the time of making such lease, could not take advantage of such defect, plaintiff as their assignee, did not acquire any greater right.—*Egber v. Kimberly*, Pa., 23 Atl. Rep. 437.

55. LICENSE — Revocation. — A mere verbal license given to an adjoining owner to erect a retaining wall on the licensor's land is revocable of such wall.—*Croasdale v. Lanigan*, N. Y., 29 N. E. Rep. 824.

56. LIMITATIONS—Counties.- The liability of the es-

tate of an insane person for the expenses of his care in the State asylum is to the county and not to the State; and the statute of limitations will run against the county from the time of its payment of such expense to the State.—*Harrison County v. Dunn*, Iowa, 51 N. W. Rep. 155.

57. LIMITATION — Purchase of School Furniture. — Where a trustee, acting for a school township, buys furniture, which is received and used in the schools, and is of the value agreed to be paid, an acknowledgment of indebtedness issued by him on behalf of the township constitutes a valid written contract, such as he is authorized to make, and is not therefore, within Rev. St. 1881, § 292, subd. 1, limiting the time within which actions on accounts and contracts not in writing must be commenced.—*Noble School Furniture Co. v. Washington School Tp. of Daviess County*, Ind., 29 N. E. Rep. 935.

58. MANDAMUS TO COURT—Habeas Corpus.—*Mandamus* will lie to compel a criminal court to allow a writ of *habeas corpus* for the purpose of giving bail, such action being within the judicial discretion of that court.—*Ex parte Jones*, Ala., 10 South. Rep. 429.

59. MARRIED WOMAN—"Contract of Surety."—A note executed by a wife in payment of a transcript of a judgment against her husband, necessary to appeal the case, is not a "contract of surety," within Rev. St. § 5119, prohibiting married women to enter into any "contract of surety;" especially when she holds junior liens against his property which will receive priority if the judgment is reversed.—*Morningstar v. Hardwick*, Ind., 29 N. E. Rep. 929.

60. MASTER AND SERVANT — Duty to Employ Skillful Fellow-servant.—A company employing helpers to its blacksmiths is bound to see that they are reasonably skillful in that work; but this duty is discharged if the foreman employing them exercised ordinary care therein.—*Melville v. Missouri River, etc. Co.*, U. S. C. C. (Mo.), 48 Fed. Rep. 820.

61. MASTER AND SERVANT—Defective Appliances.—A workman engaged in the line of his duty, and free from negligence, injured while on a slide pushing ice into an ice house by the giving way of the slide, caused by the loosening of the parts by the constant vibration, it being insufficiently braced, he having no knowledge of its actual condition and no opportunity to know it, can recover from his employer for the injuries.—*Fink v. Des Moines Ice Co.*, Iowa, 51 N. W. Rep. 156.

62. MASTER AND SERVANT—Negligence.—An employee has a right to presume that his master has used reasonable care in guarding against defects in appliances furnished for his use.—*Norfolk & W. R. Co. v. Nunnally's Adm'r*, Va., 14 S. E. Rep. 367.

63. MASTER AND SERVANT—Negligence.—Plaintiff was injured while braking on defendant's road. Defendant's rules prohibited the uncoupling of cars except by the use of a stick, and plaintiff knew of such rules. The conductor told plaintiff to uncouple certain cars. While he was pulling the coupling pin with his hands, a brakeman, who was left by the conductor to do the signaling, signaled the engineer to reverse the engine, and plaintiff was thrown between the cars, and injured. The uncoupling could not have been done with a stick: *Held* that, though plaintiff was negligent, the proximate cause of the injury was the negligent conduct of the brakeman in giving the signal.—*Richmond & D. R. Co. v. Rudd*, Va., 14 S. E. Rep. 361.

64. MECHANIC'S LIEN.—Digging cellars and foundations is a part of the erection and construction of a building, sufficient to support a mechanic's claim.—*McCristal v. Cochran*, Pa., 23 Atl. Rep. 444.

65. MECHANIC'S LIEN.—Under Act March 6, 1883, § 9, which provides that a subcontractor employed in erecting a building may give the owner notice in writing that he will hold him liable for his claim to the amount due the contractor, or an action by such subcontractor against such owner to enforce the claim is not founded on such notice, within the meaning of Rev. St. § 362, which provides that, when a pleading is founded on a written instrument, the original, or copy thereof, must be filed with the pleading.—*Adamson v. Shaner*, Ind., 29 N. E. Rep. 944.

66. MECHANIC'S LIEN — General Contract. — Where plaintiff furnished a large quantity of brick under a general contract to a contractor, engaged in the erection of several distinct buildings, and had no knowledge that any particular supply was going to any particular building, he cannot enforce a lien for a balance due against one of the buildings in which a portion of the brick were used, the statute granting such a lien for "materials furnished to be used" in a building.—*Eisenbeis v. Wakeman*, Wash., 28 Pac. Rep. 923.

67. MORTGAGES — Consideration. — In the absence of direct evidence of the consideration of a mortgage,—the mortgagor having absconded and the mortgagee being dead,—it will be inferred from the fact of the indebtedness from the mortgagor to the mortgagee at the date of the mortgage, and its continuance and increase, that the mortgage was given to secure such indebtedness and such future indebtedness as might arise.—*Lanahan v. Lawton*, N. J., 23 Atl. Rep. 476.

68. MORTGAGE—Foreclosure.—In a suit to foreclose a mortgage given to a corporation, and by it assigned to plaintiff by indorsement, where the indorsement has been introduced in evidence without objection, the signature and corporate seal of the corporation must be assumed to be genuine, and not to have been affixed by proper authority, and cannot be objected to as insufficient by defendant for the first time on appeal.—*Burnett v. Lyford*, Cal., 28 Pac. Rep. 855.

69. MORTGAGE — Foreclosure—Wills.—It is no defense to a suit by executors to foreclose a mortgage of their testator that the testator made a later will than that under which complainants are acting, which has not been offered or admitted to probate.—*Moss v. Lane*, N. J., 23 Atl. Rep. 481.

70. MORTGAGE—Receiver in Foreclosure.—A complainant in mortgage foreclosure, who nominates and procures to be appointed as receiver his own solicitor and agent, must bear the loss caused by his defalcation and the insufficiency of his sureties.—*Sorchan v. Mayo*, N. J., 23 Atl. Rep. 479.

71. MORTGAGES ON CROPS—Lien.—A judgment in ejectment is not conclusive upon a person occupying part of the land, not made a party; and a mortgage by such person on the crops, pending the suit, creates a valid lien thereon, though the mortgagee has notice of the ejectment suit.—*Hooper v. Payne*, Ala., 10 South. Rep. 431.

72. MUNICIPAL CORPORATIONS—Annexation.—The fact that the question of the annexation of a village to a city is voted on in the village at its regular municipal election, and in the city at its regular municipal election held on another day, does not invalidate such election, since by Rev. St. 1891, ch. 24, § 211, the county judge is given a discretionary power to submit the question of annexation at either a special election called for that purpose, or at any municipal election, or at any general election to be holden in each of said incorporated cities, towns, or villages."—*Village of North Springfield v. City of Springfield*, Ill., 29 N. E. Rep. 849.

73. MUNICIPAL CORPORATION—Public Improvements—Contracts.—A valid contract made in 1879 for street improvement, under St. 1871-72, p. 809, which provided for extensions of time, could not be affected by Const. art. 11, § 19, which took effect in 1880, and provided that no contract for such improvement should be made, the cost of which was chargeable on private property, unless an assessment therefor be first levied, collected, and paid into the city treasury, though such extensions were made after the constitution took effect.—*Ede v. Knight*, Cal., 28 Pac. Rep. 860.

74. MUTUAL BENEFIT INSURANCE—Forfeiture—Waiver. —The receipt of dues from a member of a mutual benefit association after the expiration of the time limited for their payment, and a letter from the association to him informing him that the association has reinstated

him provided he was in usual good health when the dues were paid, does not amount to a waiver of a forfeiture of the policy, where the injured was in fact fatally ill at the time of payment.—*Garbutt v. Citizens' Life Endowment Ass'n*, Iowa, 51 N. W. Rep. 148.

75. NEGLIGENCE—Improper Performance of Contract.—Defendant cleansed a privy vault for the landlord of the premises, who accepted and paid for the work: *Held*, that defendant was not liable for injuries occasioned by a loose board, left by his servants upon the roof of the privy structure, falling upon the child of a tenant, more than a year after completion of the work.—*Fitzmaurice v. Fabian*, Penn., 23 Atl. Rep. 444.

76. NEGOTIABLE INSTRUMENTS—Liability of Indorser.—Evidence that it was understood between the indorser and the indorsee of a note that if the latter could not collect it from the maker he would come back on the indorser, and that he took the note because he had better opportunities than the indorser to see the maker, does not tend to show that the indorser waived notice of the maker's refusal to pay.—*Wright v. Liesenfield*, Cal., 28 Pac. Rep. 849.

77. NEGOTIABLE INSTRUMENTS—Parol Agreement.—In an action by the payee against the maker of a promissory note which specifies no time for payment, the latter may show a contemporaneous parol agreement that the same should not mature until the payee's marriage.—*Horner v. Horner*, Penn., 23 Atl. Rep. 441.

78. NEGOTIABLE INSTRUMENTS — Transactions with Decedent.—Where a wife, on the death of her husband intestate, leaving children, without authority, takes possession of his estate, and is sued on a note given by her in consideration of a note which the holder represented to have been executed by her husband, plaintiff is incompetent to testify as to the consideration of the note given by the husband, since defendant, though not an executrix, administratrix, heir at law, or survivor of her husband, is a "next of kin," within the meaning of Code, § 3639.—*French v. French*, Iowa, 51 N. W. Rep. 145.

79. PARTITION—Witness.—In a suit by the heirs of a deceased person against his widow for partition of land which they allege to belong to the estate of the decedent, and which the widow claims as her own, she is not a competent witness on her own behalf.—*Lancaster v. Blaney*, Ill., 29 N. E. Rep. 870.

80. PARTNERSHIP — Defective Organization.—One who aids and assists in the organization of a limited partnership cannot thereafter hold the members liable as general partners, upon the ground that such organization was defective.—*Allegheny Nat. Bank v. Bailey*, Penn., 23 Atl. Rep. 439.

81. PARTNERSHIP—Notice of Dissolution.—At the close of a season's business a partnership, running a creamery under the names of both partners, was dissolved; and, on the opening of the following season, one of the partners carried on the business with the old patrons until nearly the close of the season, when he absconded: *Held*, that the fact that during such time the patrons were paid by checks drawn in the name of the continuing partner alone was sufficient notice of the dissolution.—*Kehoe v. Carville*, Iowa, 51 N. W. Rep. 166.

82. PATENTS FOR INVENTIONS—License to Manufacture.—Licensees authorized to manufacture a patented article on the payment of a stipulated royalty during the term of the patent, with the understanding that, if it "shall be declared invalid by any court of competent jurisdiction, the payment of the royalty shall thereupon cease," cannot defend an action for the royalties on the ground of the invalidity of the patent, where such invalidity was never judicially declared.—*Hardwick v. Galbraith*, Penn., 23 Atl. Rep. 451.

83. PLEADING — Set-off and Counter-claim. — Under Code, § 2659, subd. 2, providing that a cause of action in favor of defendant arising out of the transaction connected with the subject of the action may be pleaded as a counter-claim, the defendant in an action on a promissory note may set up that certain collateral security for payment of the note, given to the holder of it, has been lost by the negligence of the latter.—*First Nat. Bank of Ft. Dodge v. O'Connell*, Iowa, 51 N. W. Rep. 162.

84. PRESUMPTIONS.—Presumptions of fact are not, like presumptions of law, governed by fixed rules. They are mere inferences, drawn by the judicial mind from the facts and circumstances of each particular case, dependent on their own natural efficacy in generating belief or conviction. Slight variations in the facts of any particular case alter the force of such presumptions, and all the facts must be considered together in determining their application.—*Succession of Borge*, La., 10 South. Rep. 418.

85. PRINCIPAL AND SURETY — Notice to Surety. — Where an agent in California of an insurance company in New York, under a contract requiring him to remit payments within 50 days from the end of the month in which they are payable, fails, through tardiness and neglect, but with no wrongful intent, to remit the premiums until from 60 to 120 days after the end of such month, and this action is acquiesced in by the company as substantial compliance with the contract, failure of the company to give notice of such delay to the surety on the agent's bond, indemnifying the company against losses caused by the agent's fraud or dishonesty, is not a breach of a condition of the bond that the company shall report to the surety "any act of omission or commission on the part of the" agent "that might involve a loss from which the" surety "is responsible hereunder.—*Pacific Fire Ins. Co. v. Pacific Surety Co.*, Cal., 28 Pac. Rep. 842.

86. QUIETING TITLE.—In an action to cancel a deed as a cloud on plaintiff's title, defendant cannot allege the failure of plaintiff to prove title in his grantor, where such defendant claims under the deed from plaintiff sought to be canceled, and also under a quit-claim deed from plaintiff's grantor.—*Jackson v. Tutebo*, Wash., 28 Pac. Rep. 916.

87. RAILROAD COMPANIES—Crossing — Negligence.—A traveler who, in reliance upon the usual custom of a railroad in the order of running its trains, only looks in one direction before driving upon a crossing, and is injured by a train coming from the opposite direction, which he would have avoided had he looked in that direction, cannot recover, though the usual crossing signals were not given.—*Nixon v. Chicago R. I. & P. Ry. Co.*, Iowa, 51 N. W. Rep. 157.

88. RAILROAD COMPANIES—Defective Crossing—Negligence. — A railroad crossed a highway at an oblique angle, on a level, and the crossing was filled in with planks, the rails projecting about an inch and a half above the planking. Plaintiffs, traveling along the highway in a cart, at five or six miles an hour, drove across without slackening their speed, and were upset by the wheel catching where a plank had been removed by the railroad company: *Held*, in an action against the company for the injuries sustained, that the question of contributory negligence was for the jury.—*Whalen v. Arcata & M. R. R. Co.*, Cal., 28 Pac. Rep. 833.

89. RAILROAD COMPANIES — Injuries — Unballasted Track.—A railroad company owes no duty to a brakeman in its employ to ballast storage or switch tracks so as to prevent his foot being caught between the ties. *Finnell v. Delaware, L. & W. R. Co.*, N. Y., 29 N. E. Rep. 825.

90. RAILROAD COMPANIES— Negligence.—A complaint alleging that plaintiff's decedent was a brakeman employed by defendant railroad company; that it was his duty to set the brakes at all stations where his train stopped; that as he was attempting to go to his post of duty by the usual way, through a window in the top of the caboose, which was negligently placed near the edge of the car, he fell between the cars, and was killed, without negligence on his part,—does not show that decedent was negligent in being away from his post.—*Louisville, N. A. & C. Ry. Co. v. Hobbs*, Ind., 29 N. E. Rep. 934.

91. RAILROAD COMPANIES — Injuries — Negligence. — Where plaintiff was employed by defendant to clean engines, and, being inexperienced, was placed under the charge of certain other employees, there was no

negligence on their part in ordering him to clean an engine standing still on the track, where they had no reason to suppose that he would go under the engine, whereby he was injured. — *Spencer v. Ohio & M. Ry. Co.*, Ind., 29 N. E. Rep. 915.

92. RAILROAD COMPANIES — Negligence — Failure to Stop and Listen.—Where a railroad company constructs its road upon a highway, and erects embankments along the side, obstructing the view and impairing the usefulness of the highway, contrary to Rev. St. 1881, § 3903, cl. 5, and an engineer, approaching at an unusual hour, fails to give the statutory signals in time to enable a person driving along the road to take his horses to a safe distance, and the horses become frightened and run away, the driver's failure to stop and listen, although he knew the horses were afraid of the cars, is not negligence. — *Hoggatt v. Evansville & T. H. R. Co.*, Ind., 29 N. E. Rep. 941.

93. RAILROADS — Elevated Railroads. — A street railroad built upon a verticle iron pillars at an elevation of 20 feet above the street, and extending a distance of three-quarters of a mile, is an elevated road, within the meaning of Code, art. 23, § 186, declaring that no such road shall be constructed except under a special charter; and the fact that the road was elevated only for the purpose of avoiding the tracks of a steam railroad on the surface of the street, and that a descent was made as soon as said tracks were out of the way, will not take the case out of the operation of the statute.—*Koch v. North Ave. Ry. Co. of Baltimore City*, Md., 23 Atl. Rep. 462.

94. RAILROADS — Exclusive Right. — An ordinance which grants to a street-railroad company the right to use the tracks of another company on a certain street, but which declares that nothing therein shall be construed to grant any right to lay additional tracks on a certain bridge, owned by the city and a part of the said street, is not intended to secure to the company whose tracks are already on the bridge a monopoly of the right of way, but only to avoid incumbering the bridge with unnecessary tracks. —*North Baltimore Pass. Ry. Co. v. Mayor*, Md., 23 Atl. Rep. 470.

95. RAILROADS — Street Railways — Electricity. — Although electricity was not used as a motive power for street-cars at the time the said ordinance was passed, the council nevertheless had power to grant to an electric company the right to use the said tracks; and the fact that some change would be necessary so as to adapt them to the use of such a company, and that the business of the other company would thus be disturbed to some extent, could make no difference, since such a change and disturbance were not to be allowed without just compensation. — *North Baltimore Pass. Ry. Co. v. North Ave. Ry. Co.*, Md., 23A tl. Rep. 466.

96. REAL ESTATE AGENT— Commissions. — Defendant contrated in writing with certain brokers, "solely, to sell" his land on a certain commission. They found a purchaser who contracted to purchase, but by reason of defects in the title refused to accept the land. In an action for such commissions, defendant claimed that the words "solely, to sell," made the right to commission contingent on the consummation of the sale: *Held*, that those words merely intended to give the brokers an exclusive agency for the sale of the land.—*Smith v. Schiele*, Cal., 28 Pac. Rep. 857.

97. RES JUDICATA.— Plaintiff's agent had knowledge that a dispute existed between the owner of property and his grantor as to the *bona fides* of the owner's title, and before loaning money on mortgage thereon waited to see if suit would be brought, and the grantor knew of the agent's intention to loan money on the land: *Held*, that the knowledge of the dispute was sufficient to put plaintiff on inquiry as to its merits, but he would not be bound by a decree in a suit between the grantor and the mortgagor in another State, commenced after the mortgage was given, to which plaintiff was not a party. *France v. Holmes*, Iowa, 51 N. W. Rep. 152.

98. SALE—Actions for Price—Parol Evidence.—In an action for the price of a threshing-machine sold under a written contract, evidence of representations made before the contract was signed is inadmissible, in the absence of any allegations that the contract was signed by mistake or fraud.—*Staver v. Rogers*, Wash., 28 Pac. Rep. 906.

99. SALE—Action for Price—Title.—In an action for the price of goods sold, it is no defense that the title to the goods was in a third person at the time of the sale, while defendant still holds possession of the goods.—*Johnson v. Oehmig*, Ala., 10 South. Rep. 430.

100. SCHOOL ORDERS—Rescission of Contract.—In an action upon a school order, given for supplies furnished to defendant school-district, defendant may seek a rescission of the contract on the ground that, through a conspiracy between plaintiff's assignor and an officer of defendant, the order was issued for a sum greatly in excess of the value of the supplies furnished, although defendant made no previous offer to rescind, or to restore the consideration actually received.—*Kittinger v. Monroe School Tp. of Pulaski County*, Ind., 29 N. E. Rep. 931.

101. SLANDER—Pleadings.—In an action for slander, an allegation in the complaint that defendant, at a certain time and place, in the presence and hearing of divers persons, "spoke the following words of and concerning plaintiff: 'She is a damned thief,'" though there is no averment that the words were understood by those who heard them to refer to plaintiff, is sufficient under Code Civil Proc. § 460.—*Harris v. Zanone*, Cal., 28 Pac. Rep. 845.

102. SPECIFIC PERFORMANCE—Evidence.—In an action for the specific performance of a contract for the delivery of a policy of insurance on plaintiff's stock of merchandise running from May 28, 1890, to May 28, 1891, plaintiff and his book-keeper testified that it was plaintiff's custom to renew his policies of insurance from year to year, and that the policy which expired May 28, 1890, had been indorsed by defendant's agent as follows: "It is understood that this policy is in force from May 28, 1890:" *Held*, that no agreement to deliver a policy was shown.—*Dodd v. Home Mut. Ins. Co.*, Oreg. 28 Pac. Rep. 881.

103. SPECIFIC PERFORMANCE—Venue.—Code, § 47, providing that actions for the recovery of, for the possession of, for the partition of, for the foreclosure of a mortgage on, or for the determination of questions affecting the title of, or for injuries to land, shall be commenced in the county or district in which the land, or part thereof, is situated, does not apply to actions for the specific performance of contracts for the sale of land.—*Morgan v. Bell*, Wash., 28 Pac. Rep. 925.

104. TAXATION—Corporations.—A corporation organized under the laws of the State of New York, having its principal office in the city of New York, keeping its bank-accounts there, and employing a portion of its capital there in the payment of corporate expenses, is liable to taxation as a domestic corporation, though the whole of the business for which it was incorporated be prosecuted in a foreign country.—*People v. Wemple*, N. Y., 29 N. E. Rep. 812.

105. TAXATION—Electric Light Companies.—A corporation engaged in the business of generating and supplying electric currents for illuminating and other purposes is within Laws 1881, ch. 361, § 3, exempting from taxation "manufacturing corporations carrying on manufactures within this State.—*People v. Wemple*, N. Y., 29 N. E. Rep. 808.

106. TELEGRAPH COMPANIES—Measure of Damages.—In an action against the telegraph company to recover the difference in price between the stock at the time the message should have been delivered, and the time it actually was delivered, the damages were too remote, uncertain, and speculative, and there could be no recovery therefor.—*Cahn v. Western Union Tel. Co.*, U. S. C. C. of App., 48 Fed. Rep. 810.

107. TRESPASS—Vindictive Damages.—In an action for trespass, an instruction that, if the jury found defendant's conduct to be willful, plaintiff would be entitled to

damages, and that the amount was entirely for them, is misleading, as tending to give the jury the impression that plaintiff could only recover in case defendant's conduct was wilful.—*Stephenson v. Brown*, Penn., 23 Atl. Rep. 443.

108. TRIAL—"Compromise Verdicts."—An instruction that the law "expects and will tolerate reasonable compromise and fair concessions" on the part of the jury is erroneous.—*Richardson v. Coleman*, Ind., 29 N. E. Rep. 909.

109. TRIAL—Witnesses.—An instruction to a jury, as to two witnesses, that if they are of equal credibility the one offsets the other, and unless further evidence is given by other witnesses, or circumstances proved give a preponderance for the plaintiff, they should find for defendant, is erroneous, as misleading, and as expressing an opinion as to the credibility.—*Johnson v. People*, Ill., 29 N. E. Rep. 895.

110. TRUSTS—Charitable Uses — Trustee.—Under the act of April 26, 1855 (P. L. 331), providing that no disposition of property for any religious, charitable, etc., use shall fail for want of a trustee, and authorizing a court having equity jurisdiction to appoint a trustee to carry the testator's intention into effect, the court of common pleas may appoint a trustee of ground-rents devised to a church society, who may sue for and recover the same.—*Frazier v. Rector, etc., of St. Luke's Church*, Penn., 23 Atl. Rep. 242.

111. VENDOR AND VENDEE — Sale—Trustee. — Where vendees buy land from a trustee, and, according to the contract, to which the *cestui que trust* is a party, pay merely half the stipulated price by allowing a credit on a supposed debt against the *cestui que trust*, and it subsequently turns out that the debt does not exist, a bill by the administrator of the *cestui que trust* to enforce a vendor's lien for purchase money to the amount of the supposed debt is without equity, since it seeks to enforce a money payment, which was never agreed to.—*Sayre v. Wescott*, Ala., 10 South. Rep. 421.

112. VENUE IN CIVIL CASES.—An action against a railway company for injury to land in Cook county, Ill., from fire escaping from its locomotive, being a local action, cannot be maintained in the circuit court of the adjoining county of Lake, Ind., though defendant's railroad extends through both counties.—*Du Breuil v. Pennsylvania R. Co.*, Ind., 29 N. E. Rep. 909.

113. WIFE'S SEPARATE ESTATE—Action for Necessaries. An action at law will not lie against the estate of a deceased wife to charge her separate estate for the payment of articles used for the support of the family during coveture.—*Harman v. Siler*, Ala., 10 South. Rep. 430.

114. WILLS—Annuities.—A will gave the residue of an estate to trustees, in trust to pay testator's widow "$7,000 for each and every year during her natural life:" *Held*, that the widow's right to the full amount of the annuity was in no way dependent upon the income of the estate.—*In re Cooper's Estate*, Penn., 23 Atl. Rep. 456.

115. WILLS — Charitable Bequests—Definiteness. —A bequest to trustees, with directions to pay over the fund "to some Presbyterian Institution in Baltimore, as they may determine, for charitable or religious purposes," is void because of the indefiniteness of the beneficiary. —*Gambel v. Trippe*, Md., 23 Atl. Rep. 461.

116. WILLS — Construction. — A testator bequeathed "all my property, both real and personal, to my faithful and beloved wife, M E, to do with and dispose of after my death as she may think best; and I further declare it to be my will that, at the decease of my wife, M E, my real estate be equally divided among my heirs, and the personal property which she may leave to be disposed of as she may desire:" *Held*, that a life estate in the land was given the wife, with remainder to the heirs, and the personal property was given absolutely.—*Ewbank v. Smiley*, Ind., 29 N. E. Rep. 919.

117. WILLS—Construction.—Testator devised property in trust for a daughter during her life, and after her death in trust for her child or children then living, and, in the event of the death of any child during the mother's life, the issue of such child to take the part of the parent. The residuary clause was as follows: "All the rest and residue of the property over which I have any control, including ready money, rents, dividends, and other moneys due me at the time of my death, shall be divided," etc: *Held* that, in the event of the death of all the daughter's children without issue during her life time, the estate passed by the residuary clause.—*Reid v. Walbach*, Md., 23 Atl. Rep. 472.

118. WILLS—Construction.—Testatrix made a bequest to the "Christian Missionary Society of this State." She was a member of the Church of Christ in Indiana, and that church had but one missionary society in the State, which was commonly known by the name mentioned in the will, although its legal name was the "Missionary Society of the Churches of Christ in Indiana:" *Held*, that evidence of the above extrinsic facts was admissible to identify the legatee, and that, therefore, the bequest was not void for uncertainty.—*Chappell v. Missionary Society etc.*, Ind., 29 N. E. Rep. 924.

119. WILL—Construction.—Where there is a bequest to one person, and "in case of his death" to another person, such and similar expressions, unexplained by the context, will be held to mean death happening before the period of distribution or payment.—*Brown v. Lippincott*, N. J., 23 Atl. Rep. 497.

120. WILL — Construction. — Where a testator, after various bequests, bequeaths to his wife the use and income of all the residue of his real estate of which he dies possessed, or in any manner interested, for life, or so long as she shall remain his widow, and by a later clause gives to his wife and his children, to be taken by them share and share alike, "all the rest and residue of my property which has not been specifically bequeathed and devised," the widow takes an estate for life or widowhood in after-acquired land of which the testator died seised.—*Roberts v. Roberts*, Ill., 29 N. E. Rep. 886.

121. WILL — Construction — Trust.—Where lands are devised to trustees, with directions to apply the rents and profits to the support of the testator's widow and children, and with the further direction to sell the same at the expiration of 10 years after his death, and to divide the proceeds among his children and his widow, but, in case of the remarriage of his widow, then to pay her a certain sum in cash in lieu of her equal interest, the legatees take a vested interest.—*Huber v. Donoghue*, N. J., 23 Atl. Rep. 495.

122. WILLS—Creation of Trust.—The expression of a wish or desire on the part of a testator, accompanying an absolute devise or bequest, that a particular application be made of the whole or a definite part of the property bequeathed or devised, is obligatory, and creates a trust, unless, from the context, it clearly appears that the first taker is intended to have discretionary power to control or defeat the desire expressed. —*Eberhardt v. Perolin*, N. J., 23 Atl. Rep. 501.

123. WILLS — Personal Property.—Defendant's intestate left a Bible, on the last leaf of which was written in her handwriting, and signed by her, the following: "$5,000 for West Md. College. $1,000 of it to be given to the Theological Seminary; $1,000 to Ward Hall. The $3,000 to be given to the main college:" *Held*, that this paper could not be admitted to probate as a valid will. —*Trustees of the Western Maryland College v. McKinstry*, Md., 23 Atl. Rep. 471.

124. WILL—Right of Executrix to Sell Land.—Under Hill's Code, § 1142 *et seq.*, making a decedent's land chargeable for his debts, after his personalty is exhausted, a will, whereby testator devises land to his executrix, "after the payment of all his just debts," gives no implied power to the executrix to sell the land to pay the debts.—*Worley v. Taylor*, Oreg., 28 Pac. Rep. 903.

125. WITNESS—Competency—Husband and Wife.—On the prosecution of a husband for an assault committed on his wife, the wife is not only competent, but she may be compelled, to testify against the husband.—*Johnson v. State*, Ala., 10 South. Rep. 427.

ABSTRACTS OF DECISIONS OF THE MISSOURI COURTS OF APPEAL.

ST. LOUIS COURT OF APPEALS.

TRIAL — Stipulation by Attorney.— An attorney in charge of a case has implied authority for his client to enter into stipulation that the case for which counsel are retained shall abide the result of another case which is prosecuted by a different party and under control of different counsel. Affirmed. — *Scarritt Furniture Co. v. Moser.*

WATER-COURSE — Obstruction — Damages.—Damages for obstruction of plaintiff's water-course by the erection of embankment by defendant should be assessed to the date of institution of suit by plaintiff, and not up to the date of trial. Affirmed.—*Hudson v. Burk.*

WATER COMPANIES—Use of Water for Livery Stable.—Injunction will not lie by livery stable keeper against one who has franchise for furnishing water to inhabitants of a city, to compel the latter to remove meter placed there for the purpose of measuring the amount of water furnished to the former, and charging extra for same above a reasonable amount, where it appears that the livery stable was in the habit of using and wasting water unreasonably, and the ordinance giving the franchise gave the water company power to shut off or prevent waste or wrongful use of water by consumers. Affirmed.—*McDaniel v. The Springfield Waterworks Co.*

KANSAS CITY COURT OF APPEALS.

ABANDONMENT—Criminal Prosecution.—In a prosecution for abandonment under § 3501 R. S. 1889: *Held*, this offense, to be punishable under this statute, must have been committed in the State of Missouri; the party charged must have violated the laws of this State.—*State of Missouri v. Weber.*

ASSAULT AND BATTERY—Civil Action—Abatement.—In a suit for damages against a constable and surety on his bond, the plaintff alleged that the constable, while arresting him, unnecessarily beat and injured him. Pending the action and before trial the constable died: *Held*, when a cause of action is dead as to the principal it cannot be alive as to the surety. A cause of action for assault and battery died with the wrong-doer; the bond obligated the sureties to respond to a legal cause of action so long as it remained a legal cause of action; if the cause of action ceases to exist against the wrong doing person, nothing remains for which the surety can be held liable.—*Melvin v. Evans.*

ATTACHMENT LIENS—Discharge.—In a suit by a subsequent attaching creditor to postpone and nullify the attachment lien of a prior attaching creditor, who had taken a judgment by confession: *Held*, that plaintiff must be able to trace his execution lien back to the original levy of the attachment writ; the judgment rendered must be founded upon and be the result of the original process of attachment. In the case at bar the judgment by confession, being statutory in form, was not founded upon the original process, and its effect is to discharge the property from the lien of the prior attachment.—*Burnham v. Blank.*

CIRCUIT CLERK—Trustee.—In a suit to recover interest received by the clerk on money deposited with him under § 2736 R. S. 1889, by a railroad company to pay damages for land condemned for its use: *Held*, that when the money is deposited with the clerk the title thereto vests in the land owner; the clerk holds the same in trust, and must account for any profits received from it.—*Snider v. Cowan.*

CONTRACT.—In an action upon a contract stipulating that the first party will, whenever its "chief engineer shall have furnished to said first party a certificate" under his hand that said work had been finished, together with his estimate of the quantity of the work done by second party, pay to second party the sum due: *Held*, nothing is due until such certificate and estimate shall have been given by the engineer.—*The St. Joseph Iron Co. v. Halverson & Co.*

CONTRACT—Damages.—In an action for damages for breach of contract to convey land, which provided that if defects should be found in the title, and the same could not be rectified within thirty days, the contract should be null and void: *Held*, that the grantor's agreement to convey was conditioned on that being a good title; that a party may contract against defects in his title; that the vendor did that by the contract in this case.—*Terte v. Meynard.*

DAMAGES—Fellow-servant.—In an action for personal injury received by plaintiff, a section hand, at the hands of his foreman: *Held*, that a section foreman is not a fellow-servant of the men under his charge, and the fact that the injury was inflicted by the foreman himself, while engaged in the work as a co laborer, cannot alter the relation of any of the parties or affect the master's liability.—*Hutson v. The Mo. Pac. Ry. Co.*

EQUITY— Non-negotiable Note — Assignment.—In an action to enjoin foreclosing a deed of trust given to secure a non-negotiable note, the note having been paid by the maker to the payee, by a quitclaim of the property described in the deed of trust, after, but before notice of the assignment, the plaintiff having acquired title to the property by purchase through several intermediate conveyances, *held*, in a lengthy opinion and by a divided court, that the payment to an assignor, after assignment of the sum due on a non negotiable note, amounts to nothing more than a defense to the payer, and will not discharge the lien of a mortgage on lands in the hands of a third party, who is not connected with the mortgage; the assignee for value of a note who takes possession, but fails to give notice of the assignment to the debtor, has a better equity than the grantee for value by warranty deed from the assignor of the land mortgaged to secure the note, such land having been quitclaimed to the assignor by the payor in payment of the note; had the payor conveyed the land by general warranty deed instead of a quitclaim, he would have been responsible on his warranty to these plaintiffs for the incumbrance, and the defense of payment should be allowed to be set up by a third party; this case does not fall within the registration statutes.—*Bartlett v. Eddy.*

INDEMNIFYING BOND—Validity.—In an action upon an indemnifying bond given to a constable: *Held*, if the claim made under § 6311 R. S. 1889, by a third party to property levied on under execution against another, be materially informal, it will not justify the officer in requiring of plaintiff an indemnifying bond, but if the officer and plaintiff in the execution act upon such informal claim, the officer demanding and plaintiff giving the bond, such bond is valid against the plaintiff and his sureties, and will discharge the officer from liability.—*Smith v. Cabiness.*

INSTRUCTIONS—Reversible Error.—In a suit to recover money paid for commissions on sale of real estate, the trial court gave, on part of defendant, an instruction annunciating a theory of liability not in accord with that of the petition: *Held*, that defendant by his instruction invited the error of which he complained, and as he was beaten upon grounds of his own closing, outside the limits of the issues made by the pleadings, he cannot be heard to complain of the result.—*Ridge v. Frederick.*

JURISDICTION—Title to Real Estate.—In an action to set aside a will devising real estate: *Held*, the controversy involving the title to real estate, the court of appeals has no jurisdiction, and the cause transferred to the Supreme Court.—*Carl v. Gabel.*

MATERIAL-MAN'S LIEN—Itemized Account.—In an action to enforce a materialman's lien: *Held*, the account to make a separate charge for the price of each item of the materials furnished invalidated the account as to such items as are lumped, but not as to items properly stated in the account, the lumping charges not being so blended with the other items that it is impossible to separate them.—*Deardorff v. Roy.*